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No. 369.

Supreme Court of the United States.

R. W. MARTIN, *Appellant.*

v.

ORMOND BARBOUR, ET AL., *Appellees.*

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE EASTERN DISTRICT OF ARKANSAS.

BRIEF FOR APPELLANT.

ARKANSAS DEMOCRAT CO., LITTLE ROCK.

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STATEMENT.

This is an action for the confirmation of a tax title brought in the Circuit Court of Garland county under the following statute appearing in the Revised Statutes of Arkansas of 1884 as—

CHAPTER XXIII.

CONFIRMATION OF TITLES.

"Section 576. The purchasers, or the heirs and legal representatives of purchasers, of lands at sheriff's sales, those made by the county clerks or by the state land commissioner

of this State, in pursuance of any of the laws thereof, or those made by the order, decree or authority of any court of record, may protect themselves from eviction of the lands so purchased, or from any responsibilities as possessors of the same, by pursuing the rules hereinafter prescribed.

"Section 577. The purchasers, or the heirs and legal representatives of purchasers, at all sales which have been, or may hereafter be, made, may, when such lands are not made redeemable by any of the laws of this State applicable to such sales, or, if redeemable, may, at any time after the expiration of the time allowed for such redemption, publish six weeks in succession, in some newspaper published in this State, a notice calling on all persons who can set up any right to the lands so purchased, in consequence of any informality or any irregularity or illegality connected with such sale, to show cause, at the first circuit court which may be held for the county in which such lands are situated six months after the publication of such notice, why the sale so made should not be confirmed, which notice shall state the authority under which the sale took place, and also contain the same description of the lands purchased as that given in the conveyance to the buyer, and shall further declare the price at which the land was bought and the nature of the title by which it is held.

"Section 578. The affidavit of one or more of the publishers or proprietors of said newspaper, setting forth a copy of such notice, with the date of the first publication thereof and number of insertions, sworn to and subscribed before some justice of the peace of the city or county in which said

newspaper is published, with a certificate of magistracy from the clerk of the court of said county under the seal of his office, on being produced to said court, shall be taken and considered as sufficient evidence of the fact of publication, the date and number of insertions and the form of such notice.

" Section 579. On producing the proof of said notice, as required in the preceding section, the party publishing the same may apply to the judge of the court aforesaid to confirm said sale; and it shall be the duty of the judge in case no cause is shown against the prayer of said purchaser, to confirm the sale in question: Provided, always, that before he does so confirm it he shall be fully satisfied that said notice is in due form, that it has been regularly published, that the land has been correctly described and the price at which it was purchased truly stated, in conformity to the provisions of this act; but in case opposition be made, and it shall appear that the sale has been made contrary to law, it shall be the duty of the judge to annul it.

" Section 580. A sheriff's or auditor's deed, given in the usual form, without witnesses shall be taken and considered by said court as sufficient evidence of the authority under which said sale was made, the description of the land, and the price at which it was purchased.

" Section 581. The judgment or decree of the court confirming said sale, shall operate as a complete bar against any and all persons who may hereafter claim said lands in consequence of informality or illegality in the proceedings; and the title to said land shall be considered as confirmed and

complete in the purchaser thereof, his heirs and assigns forever; saving, however, to infants, persons of unsound mind, imprisoned beyond seas, or out of the jurisdiction of the United States, the right to appear and contest the title to said land within one year after their disabilities may be removed.

"Section 582. When no opposition is made to the confirmation of such sale, the costs attending the proceedings shall be paid by the party praying such confirmation; and when opposition is made, the costs shall be borne by the party against whom judgment is rendered.

"Section 583. In case any such purchaser shall not deem it necessary to use the remedy conferred by this act to confirm the title thereto, then the said sale shall have the effect given to it by law."

The petition (Rec. 5) alleged the forfeiture of the lands for the taxes of 1884, and their purchase from the State by the appellant. It was accompanied by the deeds (Rec. 8, 10, 12,) and the proof of publication of the notice required by the act. (Rec. 14.)

Frances Munger Barbour and Howard P. Munger, Grace E. Munger, and Robert P. Munger, by their next friend, Ormond P. Barbour, filed (Rec. 23) their answer and cross-bill, claiming to own one of the lots in controversy, lot 5, block 140, in the city of Hot Springs. It alleges (Rec. 25) that Frances was the widow of F. J. Munger, who died Dec. 26, 1881, and that on April 3, 1883, she married Barbour,

her present husband. That the lot in controversy was bought (Rec. 29) with money derived from insurance upon Munger's life, and was the joint property of herself and children. That the forfeiture (Rec. 32) for the taxes of 1884 was the result of the fraudulent failure of her agent to pay the taxes with money supplied him for that purpose, and that notwithstanding the forfeiture for that year, the lands had been put back on the tax books for the years 1886 and 1887, and that she had paid the taxes of those years. They also set up (Rec. 36, 61,) a number of alleged technical defects in the tax title. It is needless to repeat these allegations, as the greater part of them were never proved. We shall notice further on such as are important.

These parties thereupon removed their cause to the circuit court of the United States. (Rec. 46.)

Appellant answered, denying the allegations of the cross bill under oath. (Rec. 64.)

After this answer had been on file nineteen days, the appellees amended their cross bill by waiving the oath. (Rec. 79.)

Considerable evidence, to which we shall hereafter advert, was taken, and the court rendered a decree annulling the tax title and awarding to the appellees the right to redeem. (Rec. 96.)

From this the appeal is prosecuted. (Rec. 97.)

ASSIGNMENT OF ERRORS.

1. **The court erred in allowing to the appellees the right of redemption.**
2. **The court erred in holding the tax title to be void.**

I.

The court erred in allowing to appellees the right of redemption.

The right of redemption from tax sales in Arkansas is governed by the act of March 31, 1883, which appears as Section 5772 of the Arkansas Digest of 1884, and is as follows:

"All lands, town or city lots, or parts thereof, which may hereafter be sold for taxes at delinquent sale, under the laws of this State, may be redeemed at any time, within two years from and after the sale thereof, and all lands, city or town lots belonging to insane persons, minors or persons in confinement, and which have been, or may hereafter be, sold for taxes, may be redeemed within two years from and after the expiration of such disability."

It will be observed that there is no saving in favor of married women.

The title to the land was in Mrs. Munger and not in her children. (Rec. 28.)

The attempt is made to show that the children had an equitable interest in the property by reason of its having

been purchased with the proceeds of a policy of insurance upon Munger's life. But Mrs. Barbour (formerly Munger) testifies herself (Rec. 100) that "the insurance was payable to Frances M. Munger, wife." So the secretary of the insurance company testifies, "The beneficiary in his (Munger's) application for membership was Frances M. Munger, named and described in such application as his wife." (Rec. 132.)

The attempt to show that the minor children had any interest in the property has therefore failed. Under the statute Mrs. Munger has no additional rights by reason of her coverture, and the tax title being good, as we shall proceed to show, she had no right of redemption.

II.

The court erred in holding the tax title to be void.

By Sec. 4,246 of the Arkansas Digest of 1884, it is provided:

"All deeds issued by said commissioner (of State lands) * * * * * * * shall be under his hand and official seal and shall convey to the purchaser, his heirs and assigns, all the right, title and interest of the State to said lands and town lots, and such deeds shall be received as evidence in any court in the State."

In *Scott v. Woodruff*, *49 Ark.*, *266*, this act was construed, and the word *evidence* was held to mean *prima facie* evidence. The court says:

"Evidence of what? Manifestly of title to the lands conveyed. The statute having provided that the title to the land forfeited shall vest in the State upon the performance of certain acts by the Clerk, it is clear that the object of the Commissioner's deed is to convey that title to the purchaser from the State, and that the deed was intended to be *prima facie* evidence of that title. Such has been the policy of the State, as a general rule, in respect to tax deeds long prior to, and at all times since the enactment of the statutes under which the appellant's deed was executed. It was in pursuance of this favorite policy that the deed of the Commissioner of State Lands, to lands forfeited for taxes, was made *prima facie* evidence of the title, in the purchaser to the lands conveyed. As of all such legislation, the object is to relieve the grantee and those holding under him from making proof until evidence is introduced showing, or tending to show, that the deed conveyed no title.

"It was not, therefore, necessary for the appellants to have proved that all things necessary to vest title in the State were done. Their deed was *prima facie* evidence of that fact. The certificate of the clerk that he could not find in his office certain records or evidence does not overcome this *prima facie* evidence. The only effect of it, if admissible for any purpose, was to show that so much of such record or evidence as was required to be filed or of record in the clerk's office was lost."

The result of this decision is to cast upon the appellees throughout the burden of the proof. And it is an affirma-

tive burden. They must show not merely that the records do not make out a title in the appellant, but that the acts of which those records are themselves only an evidence were not in fact performed.

There is in Arkansas a statute adopted April 8, 1869, appearing as Sec. 5,791, of the Digest of 1884, which is as follows:

"Sec. 5,791. All actions to test the validity of any proceeding in the appraisement, assessment, or levying of taxes upon any land or lot, or part thereof, and all proceedings whereby is sought to be shown any irregularity of any officer, or defect or neglect thereof, having any duty to perform, under the provisions of this act, in the assessment, appraisement, levying of taxes, or in the sale of lands or lots delinquent for taxes, or proceedings whereby it is sought to avoid any sale under the provisions of this act, or irregularity or neglect of any kind by any officer having any duty or thing to perform under the provisions of this act, shall be commenced within two years from the date of sale, and not afterward."

This act was passed upon in the case of *Radcliffe v. Scruggs, 46 Ark., 96*, where, on page 107 in is said:

"We have no doubt of the power of the Legislature to cure any irregularity or illegality in a tax sale, which consists in a mere failure to observe some requirement imposed, not by the constitution, but by the Legislature itself, and the non-observance of which does not deprive the former

owner of any substantial rights; such as the failure of the collector to give bond, or the failure of the assessor to take the oath of office, or to verify his assessment list by affidavit.

"The Legislature might have dispensed with one or more of these requirements, as was done in the revenue act of July 23d, 1868. So it might provide that a failure to comply with any or all such formal requirements by any officer who was charged with any duty in the proceeding, from the assessment to the execution of the tax deed, should be cured after two years from the sale."

What are the defects for which the court set aside the tax title in this case?

1. It is said that the assessor has not complied with this section of the Digest:

"Section 5661. Every assessor shall, on or before the first day of January succeeding his election, and before entering upon or discharging any of the duties of his office, take and subscribe to the oath prescribed in section 20, Article 19, of the Constitution of Arkansas, and, in addition thereto, the following oath or affirmation, which oath shall be endorsed upon the assessment books prior to their delivery to the assessor:

"'I,———, assessor for ——— county, do solemnly swear that the value of all real and personal property, moneys, credits, investments in bonds, stocks, joint stock companies, of which statements may be made to me by persons required by law, will be appraised at its actual cash

value; that in no case will I, knowingly, omit to demand of any person or corporation, of whom by law I may be required to make such demand, a statement of the description and value of personal property, or the amount of moneys and credits, investments in bonds, stock, joint stock companies or otherwise, which he may be required to list, or, in any way connive at any violation or evasions of any of the requirements of the law or laws in relation to the listing of valuation of property, credits, investments in bonds, stocks, joint stock companies or otherwise, of any kind for taxation.' ''

Is not that a requirement imposed by the legislature alone? Could not the legislature have dispensed with this oath? If so, this omission becomes immaterial after the lapse of two years from the date of sale.

Moreover, it is not an oath exacted for the benefit of the tax payer. It is not for his protection. It is required of the assessor with a view to spur him on to omit nothing. It is solely in the interest of the state, and not of the citizen, and the state alone, and not the citizen can complain of its omission.

Besides, appended to the assessment list was the following affidavit: (Rec. 109.)

"I, De Soto Samuels, assessor, do solemnly swear that the foregoing is correct, and that I have appraised each tract or lot of land, except United States or state land at its

true value in money, and not at what it would bring at auction or at forced sale, so help me God.

D. SAMUELS, Assessor.

"Sworn to and subscribed before me this 19th day of June, 1883. Z. BELDIN, Clerk."

This oath includes everything that is essential in the other. The only words that the learned judge claims to be essential in that oath are these: "All real * * * property * * * will be appraised at its actual cash value." Of course, the expression used by the assessor, "at its true value in money," is absolutely synonymous.

Of the case of *Parker v. Overman, 18 Howard, 137*, it is sufficient to say that it was determined fourteen years before the passage of the act which was enforced in *Radcliffe v. Scruggs, supra*, and when no legislation of similar import was to be found upon the statute books of our state. In *Parker v. Overman*, it was held that the assessment was void unless the assessor took the oath of office. Under the later statutes, by which tax titles are treated with much greater favor, this is no longer true. In *Moore v. Turner, 43 Ark., 244*, it was held that the taking of the official oath was not essential to the validity of the assessment, and in *Radcliffe v. Scruggs, supra*, it is especially enumerated among the objections that are not available unless taken within two years from the date of sale. At the time *Parker v. Overman* was decided, the sheriff became ex-officio assessor upon taking the oath; but now, by Art. 7, sec. 46,

of the Arkansas Constitution, it is provided that, "the qualified electors of each county shall elect * * * one assessor * * * for the term of two years." When, therefore, he is elected and enters upon the discharge of his duties, he becomes a *de facto* officer, and his acts as such are valid.

Moore v. Turner, 43 Ark., 243.

Murphy v. Sheppard, 52 Ark., 356.

Cooley on Taxation, 2nd Ed., 255.

1 Desty on Taxation, 510.

It is further to be observed that there is no proof that the assessor did not take the oath. He was not called as a witness. It was only shown that the oath was not then in the clerk's office. This, according to the decision of the court in *Scott v. Woodruff, supra*, did not raise the presumption that the oath had never been taken, but only that it had been lost.

2. It is also urged as a ground of the decision of the court below that the statute requires a notice of two weeks to be given before a tax sale, and that in fact, only a notice of nine days was given.

The lands were advertised for three weeks before the sale, on May 9th, 16th and 23rd. The sale took place on the 25th.

The deposition of the publisher of the newspaper in which the land was advertised shows the three publications.

By an oversight on his part the first proof of publication mentions only the publications of the 16th and 23rd. But the fact of the publication is the material thing, and the form of the proof is unimportant.

Thus in *Commissioners v. Morrison, 22 Minn., 178*, it was decided that: "Under the act of March, 1874, entitled, 'an act providing for the assessment and collection of taxes,' no defect in the affidavit verifying the list filed by the Clerk of the court affects the jurisdiction of the court over the proceedings.

"If the list is filed and the list and notice prescribed by the act are in fact published, the court had jurisdiction, although no affidavit of publication was filed, and the court may certainly at any time before judgment, allow proof of publication to be filed."

The Court, by Gilfillan, C. J., say:

"The objection was also made that the affidavit of publication was insufficient, whereupon the court, against the objection of the defendant, allowed a proper affidavit of publication to be filed, and proceeded with the case. In this the court was right. It is the fact and not the proof of publication which gives the court jurisdiction. If the proof of publication first filed is defective the court may at any time (certainly at any time before judgment) allow proper proof to be filed."

The publisher of the newspaper has since filed a correct

proof of publication. That of course makes an end of the contention.

But we conceive that alike under Sec. 5782 of the Digest, and the decision in *Radcliffe vs. Scruggs*, it is immaterial whether the advertisement be for two or three weeks, or for one week. The statute says that the sale shall be valid if any notice at all is published. The rule laid down in *Radcliffe vs. Scruggs* is that anything that the Legislature could have done in the first instance, it can do by way of limitation afterwards, that if the breach of the statute does not infringe some constitutional right on the part of the tax payer which the Legislature could not have infringed in the first instance the objection must be taken before the issue of the deed. After that time it is too late to object to any irregularity which the Legislature could not have validated by previous act; and this, whether the defendant is in or out of possession.

Now, over the length of the notice to be given the Legislature has the fullest power. It can require a notice of six months or of three days, and over its discretion the court can exercise no control.

"There is no constitutional provision entitling one to notice in any particular mode; what the statute has made sufficient must be deemed so."

Cooley on Taxation, 2nd Ed. p. 482.

It is clear, therefore, that the Legislature might have prescribed that notice of the kind shown by the original

proof of publication should be sufficient, and so under the authority of *Radcliffe vs. Scruggs*, it is now too late to interpose an objection on this score.

Indeed, it may well be doubted whether any notice at all should be deemed essential to the exercise of jurisdiction; for the statute, of which every man is bound to take notice, fixes the time of sale, and is a standing advertisement.

Thompson vs. Brackenridge, 14 S. & R. 346.

Smith vs. Cleveland, 17 Wis., 571.

In most of the cases, if not all of them, where the notice is held to be jurisdictional, the statute did not fix definitely the time of sale, but left the public to learn this from the printed advertisement.

The majority of the cases hold that an advertisement on the 16th and 23rd, being in two separate weeks, would be a compliance with a requirement of an advertisement once a week for two weeks. But as there was in fact a three weeks' advertisement, shown both by deposition and by the amended proof of publication, we will not waste the time of the court by a review of those authorities.

It is not to be lost sight of that under the decision in *Radcliffe v. Scruggs* it is the settled rule in Arkansas that this two years' statute of limitations begins to run from the day the lands are stricken off by the sheriff, so that the period of limitation and the period of redemption are conterminous, and after the issue of the deed it is too late to question the

title for the failure to do any act required only by the legislature and not by the constitution.

The case of *Radcliffe v. Scruggs* is therefore a clear answer to the objections urged by the court below, and also to the various highly technical claims of the learned counsel for the appellees.

But there is in Arkansas another act, an act which was not considered in *Radcliffe v. Scruggs*, because the tax title in that case was acquired before its passage, an act passed March 31, 1883, which appears as section 5782 of the Arkansas Digest of 1884, and which is as follows:

"Section 5782. In all controversies and suits involving title to real property, claimed and held under and by virtue of a deed executed substantially as aforesaid by the clerk of the county court, the party claiming title adverse to that conveyed by such deed shall be required to prove, in order to defeat said title, either that the said real property was not subject to taxation for the year (or years) named in the deed, or that the taxes had been paid before the sale, that the property had been redeemed from the sale according to the provisions of this act, and that such redemption was had or made for the use and benefit of persons having the right of redemption, under the laws of this State; or that there had been an entire omission to list or assess the property, or to levy the taxes, or to give notice of the sale, or to sell the property. But no person shall be permitted to question the title acquired by a deed of the clerk of the county court,

without first showing that he, or the person under whom he claims title to the property, had title thereto at the time of the sale, or that title was obtained from the United States or this State, after the sale, and that all taxes due upon the property have been paid by such person or the person under whom he claims title as aforesaid. Provided, that in any case where a person had paid his taxes, and, through mistake (or otherwise) by the collector, the land upon which the taxes were paid was afterwards sold, the deed of the clerk of the county court shall not convey the title. Provided further, that in all cases where the owner of lands sold for taxes, shall resist the validity of such tax title, such owner may prove fraud committed by the officer selling said lands or in the purchaser, to defeat the same, and, if fraud is so established, such sale and title shall be void."

This act is a literal copy of the latter portion of the Iowa statute.

Iowa Rev. St., 1860, Sec. 784, p. 125.

Id., 1873, Sec. 897, p. 156.

The act has been frequently passed upon in Iowa, and has always been given its regitimate effect, as appears by reference to the cases of *Allen v. Armstrong, 16 Iowa, 509; Rhodes v. Sexton, 33 Iowa, 540; Parker v. Sexton, 29 Iowa, 421; Leavitt v. Watson, 37 Iowa, 93; Phelps v. Meade, 41 Iowa, 470; Taylor v. Ormsly, 66 Iowa, 111; Gardner v. Early, 64 Iowa, 345; Varnum v. Sheeler, 68 Iowa, 92; Pitts v. Beed, Id., 546; Sibley v. Bullis, 40 Iowa, 429;*

Lorain v. Smith, 37 Iowa, 67; Genther v. Fuller, 36 Iowa, 640; Foster v. Ellsworth, 71 Iowa, 262; Madison v. Sexton, 37 Iowa; Clark v. Thompson, 37 Iowa, 536; Martin v. Cole, 38 Iowa, 141; Rima v. Cowan, 31 Iowa, 125; Maxwell v. Palmer, 37 Iowa, 597; Easton v. Perry, 37 Iowa, 681; Francis v. Griffin, 72 Iowa, 23; Miller v. Corbin, 46 Iowa, 150; Hintrager v. Kiene, 62 Iowa, 606; Eldridge v. Kuehl, 27 Iowa, 172; Sully v. Kuehl, 30 Iowa, 276; Hurley v. Powell, 31 Iowa, 64.

The Iowa statute came before this court in *Callanan v. Hurley, 93 U. S., 387,* and Mr. Justice Strong said:

"The whole act exhibits an intention of the Legislature to enforce the payment of taxes by securing purchasers at tax sales in their purchases, and thus making it dangerous for owners of property to neglect payment of taxes due the State. It removes difficulties which had before existed in the way of establishing a tax title, and at the same time it works no injustice to owners of land subject to taxation. The law determines when the taxes shall be levied, and when they shall be paid, and it gives ample time within which to make the payment. It was under this act and in conformity with its provisions, that the Treasurer's deeds were made through which the defendant below made his claim. They are in the form prescribed by the statute. If the act is to have any effect at all, it is plain that the deeds cut off most of the averments upon which the plaintiff bases his attempt to obtain the cancellation he seeks. It is not open to him to aver and prove any allegation he puts for-

ward to establish the invalidity of the deeds, except that the property was not subject to taxation, and that there was a fraudulent combination of the defendant with others to prevent bidding."

De Treville v. Smalls, *98 U. S.*, *517*, was one arising under the Direct Tax Act, which provided that the title should be affected only by showing that the lands were not subject to the tax, that the taxes had been paid, or the land had been redeemed. The plaintiff offered to show that the lands had been irregularly assessed and wrongly described in the advertisement of sale; but the court said:

"All possible attack on the *prima facies* of the certificate was limited by the express provisions of the act, which enacted, as before stated, that it should only be affected as evidence of the regularity and validity of the sale by establishing the fact that the property was not subject to taxes or that the taxes had been paid previous to sale, or that the property had been redeemed. This left to the owner of the land subject to the tax every substantial right. It was his duty to pay the tax when due. His land was charged with it by the act of Congress, not by the commissioners; and the proceeding ending in a sale was simply a mode of compelling the discharge of his duty. All his substantial rights were assured to him by the permission to show that he owed no tax, that his land was not taxable, that he had paid what was due, or that he had redeemed his land after sale. He was thus permitted to assert everything of substance—everything except mere irregularities.

"We do not feel at liberty to disregard the plain intention of the acts of Congress. We are not unmindful of the numerous decisions of State courts which have construed away the plain meaning of the statutes providing for the collection of taxes, disregarding the spirit and often the letter of the enactments, until of late years the astuteness of judicial refinement had rendered almost inoperative all Legislative provisions for the sale of lands for taxes. The consequence was that bidders at tax sales, if obtained at all, were mere speculators. The chances were greatly against their obtaining a title. The least error in the conduct of the sales or in the proceedings preliminary thereto, was held to vitiate it, though the tax was clearly due and unpaid. Mr. Blackwell, in his Treatise on Tax Sales, says, page 71, 'that out of a thousand cases in court (of tax sales) not twenty have been sustained.' To meet this tendency of judicial refinement very many States have of late adopted very rigid legislation. The acts of Congress we are considering must have had it in view. Hence the stringent provisions they contain. They declare, in effect, that the certificate of the commissioner's sale shall be evidence of the compliance with the preliminary requisites of the sales, and that the evidence shall be rebutted only by proof of one or the other of three specified things. There is no possible excuse for not enforcing such statutes according to their letter and spirit."

It was also contended in this case that this act operated solely in favor of individuals and not of the government where the land was stricken off to it; but this position was held to be untenable.

In *Keeley v. Sanders, 99 U. S., 441*, the same act came again before the court in a case where it was claimed that the advertisement of sale incorrectly described the land, and the ruling in the previous case was re-affirmed.

Sherry v. McKinley, 99 U. S., 497, was another case arising under that act. It was there claimed that the assessment was irregular, that the sales were not sufficiently advertised, and that the lands were not sold on the day fixed in the advertisement; but the court adhered to its former rulings, and sustained the tax title.

In *Williams v. Supervisors of Albany, 122 U. S., 154*, it appeared that an assessment had not been made in the manner prescribed by law, but that the New York legislature had passed a curative act, and the tax title was upheld, Mr. Justice Field saying:

"The power of taxation vested in the legislature is, with some exceptions, limited only by constitutional provisions designed to secure equality and uniformity in the assessment. The mode in which the property shall be appraised, by whom its appraisement shall be made, the time within which it shall be done, what certificate of their action shall be furnished, and when parties shall be heard for the correction of errors, are matters resting in its discretion. Where directions on the subject might originally have been dispensed with, or executed at another time, irregularities arising from neglect to follow them may be remedied by the legislature, unless its action in this respect is restrained by constitutional provisions prohibiting retrospective legislation."

Similar acts exist in a number of the states, and have been enforced according to their true intent.

Smith v. Cleveland, 17 Wis., 556.

Stewart v. Shoenfelt, 13 S. & R., 370.

Thompson v. Brackenridge, 14 S. & R., 346.

Frick v. Sterritt, 4 W. & S., 269.

Hubley v. Keyser, 2 Penn., 496.

Virden v. Bowers, 55 Miss., 1, 18.

Gwinn v. Neiswanger, 18 Ohio, 400, 407.

Tharp v. Hart, 2 Sneed, 569.

Abbott v. Lindenbower, 42 Mo., 163.

Milledge v. Coleman, 47 Wis., 184.

Dietrick v. Mason, 57 Pa. St., 40.

Cooley on Taxation, 305.

Welty on Assessments, sec. 232.

2 Detsy on Taxation, 953.

2 Blackwell on Tax Titles, sec. 1146.

The extremely able and ingenious opinion of the learned judge of the court below, is the most remarkable instance that has ever fallen under our observation of the forced constructions so strongly condemned by this court in the case of *De Treville v. Smalls.* By *sec. 5782,* of the *Arkansas Digest,* it is provided, that a person desiring to defeat a tax deed

must prove "either that the said real property was not subject to taxation for the year or years named in the deed, or that the taxes had been paid before the sale, that the property had been redeemed from the sale according to the provisions of this act, and that such redemption was had or made for the use and benefit of the persons having the right of redemption under the laws of this state; or that there has been an *entire* omission to list or assess the property, or to levy the taxes, or to give notice of the sale, or to sell the property."

This statute, an enactment as solemn as any upon the statute book, one which has been repeatedly upheld by this court and by the appellate courts of the several states, is disposed of by the learned district judge in this summary manner: (Rec., 226, Tr., 95.)

"The intensifying adjective 'entire,' adds nothing to the legal effect of the section. A failure to give the two weeks' notice by five days is, in contemplation of law, an 'entire' failure to give the notice required by law. The section works no change in the law."

Before such a declaration, we can only stand aghast and marvel at the futility of human efforts. An act plainer in its terms, an act altering more fundamentally the former conceptions of the law, it would be impossible to conceive; aud yet we are seriously informed that it "works no change in the law."

3. As a further ground of his decision, the learned

judge contends that the putting of the lands back on the tax books, and the receipt of the taxes of subsequent years, estopped the State from claiming under the prior forfeiture. This was merely an unauthorized act of the county clerk, and it is elementary law that the State cannot be estopped by the acts of her officers.

Woodward v. Campbell, 39 Ark., 580.

Woodruff v. Berry, 40 Id., 252.

Pulaski County v. State, 42 Id., 118.

If by putting the lands back upon the tax books the rights of the State can be forfeited, tax titles depend not upon the law but upon the good faith of the county clerks. The clerk can destroy without process of law whatever tax titles he sees fit. He can put the lands of his friends back upon the tax books, and thereupon their delinquency, with all the consequences which the law attaches, is wiped away as if by the stroke of an enchanter's wand. It is needless to say that no such power resides in any official. Under our system of government arbitrary power is unknown. The officers are but the instruments of the law. So long as they proceed according to its dictates their acts are clothed with all its majesty and power; but the moment they step outside they become simple individuals, and their extra-official acts can prejudice neither the public nor any citizen.

It is clear that the county clerk had no authority to put the lands back on the tax books. When they were stricken off to the State his dominion over them was at an end. They

had passed beyond his jurisdiction, and were no longer subject to taxation. His unlawful act was therefore of no more validity than the act of the merest interloper.

The case of *Burd v. Patterson, 22 Pa. St., 219,* is instructive.

There the property owner made application to the collector to know whether the taxes on certain lands of his had been paid, and the collector told him that they had, though in fact they were still due. They were sold for the taxes, and it was held that the purchaser acquired a good title.

Furthermore, the contingency of such improper assessment of taxes is especially provided for by section 5857 of the Digest, which says: "In case any person has paid, or may hereafter pay taxes on any property, real or personal, erroneously assessed, upon satisfactory proof being adduced to the county court of the fact, the said court shall make an order refunding to such person the amount of the county tax so erroneously assessed and paid, and, upon production of a certified copy of such order to the auditor, he shall draw his warrant on the State treasurer for the amount of State tax erroneously assessed and paid. Such warrant shall be paid out of the appropriation to pay moneys arising from the erroneous assessment and collection of taxes. But in case there shall be no appropriation, or the appropriation shall have been exhausted, then the auditor shall issue a certificate of indebtedness therefor."

Such are the reasons relied upon by the court below for

setting aside the tax title. A number of others, too frivolous to receive attention in the opinion of the court, are urged by the learned counsel for the appellees, and we will briefly refer to them.

a. The date of the filing of the assessment roll does no tappear, save from the affidavit of the Assessor; but that is sufficient.

Thus in *Moore vs. Turner, 43 Ark., 244*, it was decided that "when there is nothing to show the date of filing of an assessment list with the county Clerk it will be presumed to have been filed on the date of the Assessor's affidavit attached to it."

This decision was approved in *Radcliffe vs. Scruggs, 46 Ark., 103*.

But the question is not material. In *Moore vs. Turner*, the affidavit of the Assessor indicated that the roll had not been filed until after the expiration of the time allowed by law; but it was held to be unimportant, the court deciding that, "the filing of the assessment list with the County Clerk by the third Monday in September, as required by Sec. 6 of the revenue act of 1873, was not essential to the validity of the assessment or the levy of taxes at the succeeding term of the County Court."

b. The Board of Equalization, of which the learned counsel for the appellees was chairman, made a highly diverting order (Rec. 91) upon the taking away of the tax books before the completion of its labors,

By the Arkansas Statutes of 1884, Sec. 5688, it is provided that the Board of Equalization "shall not be in session longer than two weeks in any one year."

This board had been in session considerably longer than that. (Rec. 174). The first Monday in July arrived when by Sec. 1443 of that Digest the County Court was compelled to levy the taxes. In order to make the levy it needed the tax books, and so sent after them. Thereupon the board, which had been defunct by operation of law for some days, made the amusing order to which we have referred.

c. It is also objected that the deed to the petitioner was executed by Meyers, a deputy, and not by the Commissioner of the State Lands in person.

By Sec. 4182 the Commissioner is authorized to appoint a deputy and it is shown that Myers was that deputy. As such he had all the powers of his principal.

"In general a deputy has power to do every act which his principal might do."

Bov. L., Dic. Title "Deputy."

"A deputy in law has the whole power of his principal."

Abbott's L. Dic. Ib.

It is provided by Sec. 6365 of the Digest of 1884 that any duty enjoined upon a ministerial officer may be performed by his deputy; and in *Gibson vs. Martin, 38 Ark., 207*, it was held that a deputy sheriff might execute a deed to lands sold under execution.

To obviate all difficulty, however, the deeds were re-executed by the Land Commissioner in person pending the suit. The case being in equity, and not an action of ejectment, their re-execution pending the action was effective.

d. It is said that the land was assessed as being in the town or city of Hot Springs and not in the Hot Springs Reservation.

Appellant only asks a decree for the land as assessed and sold. If the lots of the appellees are not the same, they will sustain no injury by the decree.

Besides, By Sec. 5682 of the Digest of 1884 it is provided that, "for the purpose of this act the terms town or city, and towns and cities, shall apply to all cities and towns, incorporated or not incorporated; also to all blocks or lots, or parts thereof, assessed for taxation as such, whether the same are situated in an incorporated city or town or not."

e. We are unable to perceive what bearing the testimony as to the acts of the appellees' agent, or as to other applications being made to purchase the lots, has upon the case. If the appellees' agents swindled them, that was their misfortune, not the fault of the petitioner. If some other applicant was entitled to make the purchase, the priority of rights will have to be settled in a suit between such applicant and the petitioner. It cannot concern the appellees. Besides there is no evidence tending to show that any one applied to purchase this particular lot.

f. It is said that the lot was not sold at public auction as required by the act of February 24th, 1885.

That act by its express terms applied only to "lots heretofore forfeited to the State," and as these were not forfeited until long afterwards, it has no application to this controversy.

Such are the defects that are urged against this title. Every one of them is expressly included among those which the statute declares to be immaterial. Its provisions are plain and unambiguous, leaving no room for equivocation. Its constitutionality has been repeatedly upheld by this court; and yet it has been passed over as mere meaningless verbiage that "worked no change in the law."

We submit that it is nothing of the kind. It is a statute as solemn as any upon the statute book. Of its constitutionality there can be no doubt. Its meaning is as apparent as the noonday sun. It is as much entitled to be enforced by the courts as any enactment proceeding from the legislative assembly. Titles acquired through its operation are as good as those conferred by the statute of limitations, or the enactments governing sales under execution; and it is a singular spectacle to see learned courts, after the passage of this act, proceeding as though it never existed, setting aside tax deeds for the merest technicalities, and following old precedents created under a system of revenue laws wholly distinct.

A glance at the record in this case shows that no jurisdictional defects exist. The property was subject to taxa-

tion; the taxes were not paid; it was not redeemed; it was assessed; the taxes were levied; notice of the sale was given; the property was sold. Not one of the requirements of the statute, not one of those things which by the fundamental principles of the law are necessary to confer on the officer jurisdiction to sell, was omitted. The title therefore is wholly unassailable.

Respectfully,

U. M. & G. B. Rose.

Office Supreme Court U. S.
FILED.
MAY 1 1891
JAMES. H. M. KENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 369.

R. W. MARTIN, APPELLANT,

vs.

ORMOND BARBOUR ET AL., APPELLEES.

BRIEF FOR APPELLEES.

LUTHER H. PIKE,
Attorney for Appellees.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

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OCTOBER TERM, 1890.

No. 369.

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vs.

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BRIEF FOR APPELLEES.

This suit, originally instituted in the circuit court of Garland county, Arkansas, and subsequently transferred to the United States circuit court which is held at Little Rock, is one for the foreclosure of the right to redeem from an alleged valid State tax sale and under certain provisions of the Arkansas law.

Mansfield's Digest, secs. 576, 583.

The decree, adverse to foreclosure, is before the honorable Court here for further consideration under this appeal.

Of such suits Judge Cooley, in his book on Taxation, thus expresses himself, the italicizing being ours:

"In some States it has been thought proper to provide for a foreclosure of the right to redeem in a judicial proceeding instituted by the purchaser. *In such a proceeding all*

questions of law going to the validity of the proceedings, AS WELL AS ALL QUESTIONS OF EQUITY WHICH SHOULD ENTITLE THE LAND OWNER to relief, can be considered and settled finally. The proceeding is only to be instituted at the time and in the manner prescribed at law, and the statute should be followed strictly. *It is to some extent a proceeding in the nature of a suit to quiet title*, BUT WITH MORE LATITUDE OF DISCRETION IN THE COURT TO ADAPT THE RELIEF TO THE EQUITIES APPEARING."

Cooley on Taxation, 2d ed., pp. 545–'6, citing cases.

The appellant's learned counsel open their brief thus:

"This is an action for the confirmation of a tax title, brought in the circuit court of Garland county under the following statute, appearing in the Revised Statutes of Arkansas of 1884 as—"

They set out the sections *in extenso*, pages 1–4, but the Court will not fail to observe that they decline any discussion of them.

They mention the court proceedings, but the Court will also not fail to observe that they make no statement of the facts upon which all the equities arise and which were proper to be presented by them for the Court's assistance. So we endeavor to supply the omission.

A Mr. Mungen was a traveling commercial agent, with a wife and children to provide for.

Apprehending death, he insured his life for their benefit by becoming member of two associations of such agents.

He died, and his widow, the only one named as beneficiary, received from the associations the insurance money to the amount of about $6,200.

Then the widow, uniting the larger part of this money with a small sum belonging to one of the children, invested it in the purchase of the lot of land in controversy, situate in Hot Springs, Arkansas, upon which was a building suitable and used for a hotel, and thereupon engaged in that business for the support of herself and her orphan children.

Not succeeding as well as she anticipated, she placed the property in the hands of a real-estate agent, he to rent the same and pay taxes, &c.

She then removed with the children to Illinois, and not long thereafter intermarried with the appellee, Barbour.

The agent rented the property and had in his hands therefrom ample means to have paid the taxes for the year 1884, but, being dishonest, did not do so and absconded with the money.

The result was that the property was treated as delinquent, and at a sale was stricken off to the State.

But, contrary to the law's most emphatic provisions, the property was not listed to the State of Arkansas upon the tax books for the years 1885 and 1886, and the result was that the owner's new agent—taking it for granted that the taxes for 1884 had been paid—paid them for the years 1885 and 1886 and did nothing to redeem from the delinquent tax sale of 1884.

The result was that the property was reported to the proper State officials after the two years allowed for redemption, and was by the State's land commissioner sold to the appellant, Martin, which fact coming to the knowledge of the agent, there was immediate tender of a most ample sum of money to Martin for a release, which he declined to accept.

The value of this statement is its demonstration that there was provision for and full intent to pay taxes.

The appellant, Martin, having refused to release, presented petition for confirmation of the commissioner's sale to him to the circuit court of the county in which the property is situate, under statute provisions set out *in extenso* in the brief of the appellant's solicitors.

The appellee, Barbour, came in as respondent and resisted confirmation, and, among other things, had the cause removed to the proper United States court at Little Rock, by which a decree was made dismissing the petition of appellant

and allowing redemption. As this appeal is taken to test the validity of that decree, the question presented for determination is, *Does the Arkansas law in respect to the deed of its land commissioner to the appellant warrant the decree entered?*

The decree is sustained by an able opinion delivered by the trial justice. (See Record, pp. 82–96.)

The appellant's solicitors rest their case upon what they conceive to be the character or value of the deed made to the appellant by the land commissioner as a piece of evidence under the State's statute law, notably sections 4246 and 5782, Mansfield's Digest.

The section 5782 (Appellant's Brief, p. 17) should cut no figure in the case. It relates exclusively *to deeds made by clerks of county courts* to purchasers at tax sales, and could not well apply to a land commissioner's deed, that by section 4245 could be only quitclaim. And with this remark we dismiss it from consideration.

All that is claimed for the section 4246 (*ib.*, p. 9) is that under the decision of the State's supreme court in Scott *vs.* Woodruff, 49 Ark., 296, it made the land commissioner's deed *prima facie* evidence of the title in the appellant to the property it purported to convey to him.

But this is accompanied by the admission, most guardedly made, that the deed would not prevent the respondent to appellant's petition showing that the owners of the property had been deprived of substantial right or rights by reason of the State's tax-gathering officials' failure to observe some one or more of the law's requirements in respect to either the listing or assessing the property for taxation, or selling it as delinquent, or the redemption of it after sale as delinquent.

The admission squares with the well-established rule that notwithstanding the *prima facie* character or value of the deed, the instant it is shown by the party claiming adversely to the deed that any substantial prerequisite of the law has not been complied with the *prima facie* character of the deed

is destroyed, all of its presumptions are overthrown, and the deed becomes mere waste paper.

Biscoe *vs.* Coulter, 18 Ark., 423.

Blackwell on Tax Titles, sec. 846 and citations.

In this instance the respondent proved such failure to the entire satisfaction of the trial justice, and the appellant's brief fails to show that his decree was not a correct interpretation of the law.

The action was commenced under sections 576, 577, 578, 579, 581, Revised Statutes, set out *in extenso* in appellant's brief, pages 1–4. Under well-understood rules of interpretation the other sections cited by appellant's solicitors must be read together with these.

The sections 576 and 581 promised to the appellant a certain result if he would do certain things prescribed by the other three sections. He desired the result and undertook to do the things required.

One of these was that he should invite all persons who could set up any right to the land purchased by him of the land commissioner in consequence of ANY *informality* or ANY *irregularity* or *illegality*—including the respondent, who could do so on behalf of his wife and her orphan children—to come forward and show cause why the sale he sought to have confirmed should not be confirmed.

Now, manifestly the section 5791, cited in appellant's brief, page 9, has no application to such a case, and, besides, the limitation prescribed by it begins to run from the date of sale, but only as *to technical objections to the sale*, NOT ACTUALLY PREJUDICIAL TO THE FORMER OWNER.

Radcliffe *vs.* Scruggs, 46 Ark., 107.

The section 579 said to appellant:

"*In case opposition* (to your petition for confirmation) *be made and it shall appear that the sale has been made contrary to law*, IT SHALL BE THE DUTY OF THE JUDGE TO ANNUL IT."

Now, the respondent, under the call of the appellant, did make it appear that the sale was made contrary to law—

1st. By proving in the strongest possible manner this negative, to wit, that no assessment for the year 1884 was ever made. This by proving that the assessor did not take and subscribe a certain oath or affirmation prescribed by section 5661 (Appellant's Brief, pp. 10, 11); also that it was not endorsed upon the assessment books for the year 1884, prior to their delivery to the assessor.

Section 5662 declaring—

"If any person so elected fails or refuses to take the oath required in the preceding section, and file the same with the clerk of the county court of his county within the time prescribed, the office shall be declared vacant, and the clerk of the county court shall immediately notify the Governor, and such vacancy shall be filled in accordance with the constitution and laws of the State."

Some years ago there was in force in Arkansas a provision of law like unto the foregoing, that was considered by this Court in Parker *vs.* Overman, 18 How., 137, who therein adjudged that a failure on the part of the assessor to take and subscribe such oath within the time prescribed, any assessment made by him in that year was void and could not be made the foundation for a legal sale.

In Moore *vs.* Turner, 43 Ark., 243, the supreme court of the State held that the judgment of this Court in Parker *vs.* Overman was correct upon the law as it then stood.

Well, the law passed on in Parker *vs.* Overman was repealed and a different provision was in force until 1883, when the present provision was enacted.

It is fair to presume that the Legislature of Arkansas knew in 1883 of the decisions in Parker *vs.* Overman and Moore *vs.* Turner, as to the old law, and took it for granted that the old law being replaced upon the statute book would, and intended it should, receive the same interpretation it had received formerly in the two cases just above named.

Radcliffe *vs.* Scruggs is no decision upon this law, and the way it is cited by appellant's counsel is misleading.

The sale of land for taxes is the nearest approach to tyranny that exists in a free government, and whatever tends to modify its severity is favorable to the citizen and to the rights of property and justice.

The right to sell of very necessity depends upon a duly determined delinquency on the land owner's part, and the publication of notice of sale is the crowning act on the part of the State to establish the delinquency.

Strict publication is favorable to the citizen in two aspects: First, it notifies him that his taxes are unpaid, and that the land will be sold for the taxes unless paid before the sale; second, it operates to bring competing bidders to the sale.

Strict compliance with the statutory provision as to publication of notice is a condition precedent to the right to sell.

Pennell *vs.* Monroe, 30 Ark., 661.
Thweat *vs.* Black, 30 Ark., 739.
Bagley *vs.* Castile, 42 Ark., 77.
Cooley on Taxation, 2d ed., p. 484.

In the present case there was a failure to prove it. The appellant tried to do so by means of *ex parte* affidavits presented more than two years after the sale was made. The attempt was absurd and the affidavits were disregarded. Besides, the statute law required record proof, and nothing could be substituted for it; neither could a failure to give it be excused.

By section 5763, Mansfield's Digest, it is declared:

"The clerk of the county court shall record said (delinquent) list and notice (of publication attached to it) in a book, to be by him kept for the purpose, and shall certify at the foot of said record, stating in what newspaper said list was published and the date of publication, and for what length of time the same was published, before the second

Monday in April then next ensuing, *and such record, so certified, shall be evidence of the facts in said list and certificate contained.*"

In this instance no such record was made or has ever been made.

Mr. Blackwell on Tax Titles, sections 447, 449, discussing such a provision of law, declares that the making of such a record is a peremptory provision which cannot be dispensed with without invalidating the entire proceedings.

The learned trial justice presents a most extended and elaborate discussion of this feature of the case that will receive this Court's careful consideration.

It is all that need be said except to make this suggestion :

If there had not been a palpable dereliction of duty on the part of State officials, so desirable a piece of property, worth several thousand dollars, would not have been stricken off to the State for want of bidders when the amount of tax, etc., for which it was sold was so small.

That the right to redeem is a most substantial right is beyond all question.

Statutes authorizing and conserving redemption from sale from taxes are to be construed favorably to the owner of the land, and particularly when they provide full indemnity to the purchaser and impose a penalty on the delinquent.

Corbett *vs.* Nutt, 10 Wall., 464.
Du Bois *vs.* Hepburn, 10 Pet., 1.

The law in force in Arkansas in respect to redemption at and after the time the sale under consideration was made was elaborately constructed in favor of the owner supposedly or really delinquent. In this instance its provisions were disregarded to an almost criminal extent.

By section 5705 the clerk of the county court was required to make out and deliver the tax books to the collector on or before the first Monday of November, 1884, with his warrant

thereunto attached, under his hand and seal of office, authorizing the collector to collect the taxes.

Section 5731 required the collector to give notice of his attendance at certain places to receive the taxes and to attend at the times, and thereafter to be at his office until the 10th of February, 1885, to receive taxes.

Section 5760 required the collector by the first Monday of March, 1885, to file with the clerk of the county court a list or lists of all such taxes levied on real estate as he had been unable to collect, therein describing the land or town or city lots on which said delinquent taxes were charged as the same were described on the tax books, and to attach thereto his affidavit. It required the clerk to scrutinize and correct this list.

Then by section 5762 the clerk of the county court was required to cause the list of the delinquent lands in his county *as corrected by him* to be published weekly for two weeks between the first Monday of March and the second Monday of April, 1885, in a newspaper.

By section 5763 he was to attach to said delinquent list a notice of sale by the county collector on the second Monday of April, 1885, *nisi*.

This section then went on to require the clerk to record the list and notice, &c., as we have already noticed. This before the sale.

The sale in this instance was made May 25, 1885, and by section 5769 the clerk of the county court was required to attend it and to make a record of it in a substantial book *to ke kept for that purpose*, as also of each other tract of land, town or city lot, sold to the State, together with the taxes, penalty, and costs due thereon.

And by section 5771 the clerk of the county court was required, immediately after the sale, to transfer upon the tax books all lands sold for taxes to the name of the purchaser.

There is no pretense that the clerk complied with these requirements, especially those of the sections 5769 and 5763.

Now, let us see how the matter was affected by this dereliction of duty when it came to gathering taxes for the year 1885.

Had the clerk performed his duty in respect to the delinquent tax sale of 1884 the assessor would have been prevented from returning upon the assessment for 1885, which he was by section 5676 required to make and deliver to the clerk of the county court on or before the first Monday of June, 1885, the lot in question as subject to taxation. On the contrary, by that section he would have returned it upon his assessment books as exempt from taxation by reason of its having been struck off to the State at the delinquent tax sale made in April preceding.

Again, the clerk of the county court would have been prevented from placing the lot upon the tax books for 1885, which by section 5705 he was required to make out and deliver to the collector on or before the first Monday of November, 1885.

And consequently this would have been the result: The owners, presenting themselves to pay taxes for the year 1885, as they did, would have been informed that there was none for them to pay, because of the lot standing forfeited to the State.

Now, having shown that on the part of the owners there was perfect intent and ample provision to pay the taxes for the year 1884, is it not manifest that they could and would have redeemed their lot but for the grossest possible omission of duty on the part of the State, acting by its officials, and that to permit the sale to the appellant to be confirmed the Court would only be assisting the State to take and have advantage of its own wrong.

We conclude if the right to redeem is a substantial right and was prevented from being exercised within the statutory period by reason of the gross dereliction of duty on the

part of the State's officers, then the sale in question was manifestly made contrary to law, and it was the absolute duty of the judge to annul it, as he did, in order to allow the redemption that has been amply tendered, and which will make every one whole and save humanity from a blush that will suffuse it should this attempt at soulless, merciless greed and cruelty be permitted to succeed under the circumstances presented.

Judge Cooley, discussing this feature of law, says:

"Whatever the statute may make provision for subsequent to the sale in order to the protection of the interest of the parties having the right to redeem must be strictly performed. The reasons which require this are the same that render imperative a strict compliance with all those provisions which are to be observed in the interest of the tax-payer before the sale is made. * * * Every provision of this nature (notice) must be strictly complied with. Nothing can be substituted for it by the officers." * * *

On Taxation, p. 536.

The State was estopped in equity by the acts of her officers in placing the lot on the tax books for the years 1885 and 1886 and receiving from the owners the taxes for those years. The receipt of these amounted to a waiver of the supposed previous forfeiture (Cooley, 541), and equity, as between the owners and the State, treats it as so much paid towards redemption and will permit and secure full redemption.

By section 4245 appellant could and did get only a quit-claim deed. Taking such a deed, the rule *caveat emptor* applies to him. He is not a *bona fide* purchaser for value without notice. (Miller *vs.* Fraley, 23 Ark., 735.) He took the land in the same plight the State held it *and subject to the same equities and defenses.*

Cooley on Taxation, 2d ed., 475, '6–553.

2 Desty on Taxation, 850.

Hickman *vs.* Kempner, 35 Ark., 505.

It is the duty of the proper officer to impart correct information to parties seeking to redeem from tax sales, and their mistake, error, or negligence will support the right of redemption after the execution of the tax deed.

2 Desty, p. 877.

The section 4268 secures to Mrs. Mungen the right to redeem, notwithstanding section 5772.

The mother of the orphan children had the right to acknowledge her trusteeship for them, and by section 581 their right to redeem is saved to them.

Karr *vs.* Washburn, 56 Wis., 303.

The brief of the appellant's solicitors is a display of industry, with copious citations of decided cases that are inapplicable, inasmuch as the section 5782, upon which they place such reliance, must, for the reason we have given above, be put out of consideration.

Respectfully submitted.

LUTHER H. PIKE,
Attorney for Appellees.

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. ~~1091~~ ~~730~~ 428 130

THE CHICAGO DISTILLING COMPANY, PLAINTIFF IN ERROR,

vs.

RENSSELAER STONE, COLLECTOR OF INTERNAL REVENUE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 3, 1887.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 1090.

THE CHICAGO DISTILLING COMPANY, PLAINTIFF IN ERROR,

vs.

RENSSELAER STONE, COLLECTOR OF INTERNAL REVENUE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the Hon. Henry W. Blodgett, judge of the district court of the United States for said northern district of Illinois, on Monday, the twenty-fifth day of July, in the July term of said court, in the year of our Lord one thousand eight hundred and eighty-seven, and of our Independence the one hundred and twelfth year.

WM. H. BRADLEY, *Clerk.*

NORTHERN DISTRICT OF ILLINOIS, *ss:*

THE CHICAGO DISTILLING COMPANY

vs.

RENSSELAER STONE, Collector of Internal Revenue, &c.

Assumpsit.

Be it remembered that on the fifteenth day of February, 1887, came Rensselaer Stone, by William G. Ewing, United States attorney, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, his petition for removal of said cause from the circuit court of Cook county, Illinois, in said above-entitled case, which said petition is in the words and figures following, to wit:

2 *Petition.*

To the circuit court of the United States of America for the northern district of Illinois:

The petitioner, Rensselaer Stone, respectfully shows to the court that he has been impleaded in a court of the State of Illinois, to wit, the circuit court of the county of Cook, by a certain corporation called the Chicago Distilling Company, in a plea of trespass on the case upon promises, to the damage of the said company, as it alleges, of five thousand dollars; that the suit in that behalf was commenced by writ of summons from the State court aforesaid, which writ bears date and teste of the eleventh day of the present month of February, and is returnable on the twenty-first day of the same month, and was served upon the petitioner on the twelfth day thereof; that the petitioner is and has been for some time last past collector of internal revenue of the United States of America for the first collection district of Illinois, and that the said suit so commenced and now pending in the said State court is a suit commenced and brought against the petitioner on account of an act done by him under color of his office aforesaid—that is to say, a suit to recover from him the amount of a certain assessment heretofore made by the

3 Commissioner of Internal Revenue of the said United States under the internal revenue laws thereof against the said company in respect of its business as a distiller, which amount so assessed is alleged to have been wrongfully exacted by

the petitioner, as such collector of internal revenue, from the said company and paid to him by the same.

Wherefore the petitioner prays that the said suit may be removed from the State court aforesaid to this honorable court, and that a writ of certiorari issue for that purpose, pursuant to the statute in such case provided.

RENSSELAER STONE.

NORTHERN DISTRICT OF ILLINOIS, *sct:*

Rensselaer Stone, in the foregoing petition named, makes oath and says that he has read the said petition, and that the matters therein set forth are true to the best of his knowledge, information, and belief.

RENSSELAER STONE.

Subscribed and sworn before me by the above-named Rensselaer Stone this 15th day of February, 1887.

H. W. BLODGETT,
Dist. Judge.

I, William G. Ewing, an attorney and counsellor at law of the circuit court of the United States of America for the northern district of Illinois, do hereby certify that as counsel for the above-
4 named petitioner I have examined the proceedings against him mentioned in the foregoing petition and have carefully inquired into all the matters therein set forth, and that I believe the said matters to be true.

Done at Chicago this 15th day of February, 1887.

W. G. EWING,
U. S. Attorney.

Endorsed: Filed Feb'y 15, 1887. Wm. H. Bradley, clerk.

On the same day, to wit, on the fifteenth day of February, 1887, in the December term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

THE CHICAGO DISTILLING COMPANY *vs.* RENSSELAER STONE.

Assumpsit.

Now comes said defendant, by William G. Ewing, Esq., his attorney, and on his motion, upon petition filed, verified by affidavit and accompanied by the certificate of the district attorney, it is ordered by the court that a writ of certiorari issue to the circuit court of Cook county, in said district, as prayed in said petition, and that the same be made returnable forthwith.

5 Afterwards, to wit, on the eighteenth day of February, 1887, came F. H. Marsh, United States marshal for said dis-

trict, and filed in said clerk's office a copy of the writ of certiorari issued out of said clerk's office on the fifteenth day of February, 1887, in said entitled cause, which said copy, together with the return of the marshal endorsed thereon, is in the words and figures following, to wit:

The President of the United States of America to the judges of the circuit court of the county of Cook, in the State of Illinois, Greeting:

Whereas it has been shown to us, in our circuit court of the United States of America for the northern district of Illinois, by the petition under oath of Rensselaer Stone, accompanied by the proper certificate of a counselor of the same court, that a certain suit of the Chicago Distilling Company, being an action of trespass on the case upon promises, against the said Rensselaer Stone was lately commenced and is now pending in your court, and that the said suit is for and on account of an act done by the said Rensselaer Stone under color of his office as collector of internal revenue of the said United States for the first district of Illinois, by which said petition the said Rensselaer Stone prays that the said suit may be removed
6 from your said court into our said circuit court of the United States, and that a writ of certiorari issue for that purpose, pursuant to section 643 of the Revised Statutes of the said United States:

These are, therefore, to command you that, without excuse or delay, you forthwith cause to be certified to our said circuit court of the United States the record and proceedings in the suit aforesaid without addition or diminution, to the end that the said suit be removed into our court aforesaid and that speedy justice be done in the premises; and have you then and there this writ, with your return thereon.

To the marshal of the northern district of Illinois to execute.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, and the seal of our said circuit court, at Chicago, in the said northern district of Illinois, this fifteenth day of February, A. D. 1887, and of the Independence of the United States the 111th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

True copy of original.

F. H. MARSH,
U. S. Marshal.

Marshal's Return.

I have served a writ of certiorari, of which the within is a true copy, by delivering the same to Hon. L. C. Collins, one of the
7 judges of the circuit court of the county of Cook, in the State of Illinois, on the 18th day of February, A. D. 1887.

F. H. MARSH,
U. S. Marshal.
GEO. N. JONES, *Deputy.*

Endorsed: Filed Feb'y 18, 1887. Wm. H. Bradley, clerk.

Afterwards, to wit, on the ninth day of June, 1887, there was filed in said clerk's office a transcript of record from the circuit court of Cook county, Illinois, in said entitled cause, which said transcript is in the words and figures following, to wit:

8 UNITED STATES OF AMERICA.

STATE OF ILLINOIS, } ss:
Cook County, }

Pleas before the Honorable Lorin C. Collins, Jr., one of the judges of the circuit court of Cook county, at a term thereof begun and held at Chicago, in said county and State, on the third Monday (being the 17th day) of January, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the one hundred and eleventh.

Present: Honorable Lorin C. Collins, Jr., one of the judges of the circuit court of Cook county, State of Illinois; Julius S. Grinnell, State's attorney; Seth F. Hanchett, sheriff.

Attest: HENRY BEST, *Clerk.*

Be it remembered that heretofore, to wit, on the 11th day of February, A. D. 1887, the Chicago Distilling Company, by Joseph Kirkland, Esq., its attorney, filed in said court its certain *præcipe*, and caused to be issued out of and under the seal of said court the people's writ of summons, directed to the sheriff of Cook county to execute, which said *præcipe* and writ, with the sheriff's return thereon endorsed, are in the words and figures following, to wit:

9 *Præcipe.*

STATE OF ILLINOIS, } ss:
County of Cook, }

Circuit Court of Cook County, to February Term, A. D. 1887.

THE CHICAGO DISTILLING COMPANY, Plaintiff,

vs.

RENSSELLAER STONE, Collector of Internal Revenue for the First District of Illinois, Defendant.

Assumpsit. Damages, $500.

The clerk of said court will issue a summons in the above-entitled cause to said defendant in a plea of assumpsit to the damage of said plaintiff in the sum of five hundred dollars, direct the same to the sheriff of Cook county to execute, and make it returnable to the February term of said court, A. D. 1887.

Chicago, February 10, 1887.

JOSEPH KIRKLAND,
Plaintiff's Attorney.

To Henry Best, Esq., clerk.

Summons.

STATE OF ILLINOIS, } ss:
Cook County, }

The people of the State of Illinois to the sheriff of said county, Greeting:

We command you that you summon Renssellaer Stone, collector of the internal revenue for the first district of Illinois, if he shall be found in your county, personally to be and appear before the circuit court of Cook county on the first day of the term thereof, to be holden at the court-house, in the city of Chicago, in said Cook county, on the third Monday of February, 1887, to answer
10 unto the Chicago Distilling Company in a plea of trespass on the case upon promises, to the damage of said plaintiff, as it is said, in the sum of five hundred dollars; and have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness Henry Best, clerk of our said court, and the seal thereof, at Chicago aforesaid, this 11th day of February, A. D. 1887.

[SEAL.] HENRY BEST, *Clerk.*

Endorsed: P'd 1.00. Served this writ on the within-named defendant, Renssellaer Stone, by delivering a copy thereof to him the 12th day of February, 1887. Canute R. Matson, sheriff, by D. W. Nickerson, deputy.

And thereupon, on the same day, to wit, the 11th day of February, A. D. 1887, there was filed in said court a certain declaration, which is in the words and figures following, to wit:

Narr.

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of Cook County, to February Term, 1887.

THE CHICAGO DISTILLING CO., a Corporation, &c.,
vs.
RENSSELLAER STONE, Collector, &c.

Assumpsit.

The Chicago Distilling Company, a corporation duly organized and existing under the laws of Illinois, of Chicago, Cook county, Illinois, plaintiff in this suit, complains of Renssellaer Stone, defendant, of a plea of trespass on the case on promises—
11 For that whereas the plaintiff was, in September, 1885, a distiller doing business in the said Chicago, in the first collection district of Illinois, and the defendant was then and there the collector of internal revenue of the United States for the said district, and the plaintiff had then and there given a bond to the United States as required by law, conditioned for the faithful performance

of its duty as a distiller, and the United States, by its officers, had theretofore, to wit, on the 1st day of May, 1882, caused the distillery of the plaintiff to be surveyed and the lawful capacity thereof to use grain and to produce spirits to be duly ascertained, such capacity being proportioned to the number of fermenting tubs which might from time to time be open for use, and in accordance with such survey and the lawful opening and closing of fermenting tubs during the month of September, 1885, and prior thereto, it was then and there lawful for the plaintiff, at its distillery, to use and distill during the said month not more than $30,256\frac{50}{100}$ bushels of grain, and it was incumbent on the plaintiff, at its said distillery, to produce during the said month not less than $114,442\frac{9}{100}$ proof gallons of spirits; and in accordance with the lawful capacity of its said distillery so ascertained the plaintiff, at its said distillery, during the said month, used $30,256\frac{50}{100}$ bushels of grain and no more, which was not in excess of its said lawful capacity to use grain, and at the same time and place the plaintiff produced $114,442\frac{9}{100}$ proof gallons of spirits, which was not less than its said lawful capacity to produce spirits as aforesaid;

Yet the defendant, well knowing the premises, did falsely assert that the plaintiff, during the month of September, 1885, did
12 use grain in excess of the surveyed capacity of its said distillery, and did not produce spirits equal to the surveyed capacity of its said distillery, and that an assessment of fifty-seven dollars and eighty-three cents had been made by the Commissioner of Internal Revenue against the plaintiff for and because of the said alleged excess of grain used and deficiency of spirits produced, and that the said Commissioner had commanded him, the defendant, to make and collect the said $57.83 from the plaintiff, whereupon the plaintiff, in due and customary form and in apt time, duly made its appeal to the Commissioner of Internal Revenue, according to the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof, averring in substance that the said assessment was illegal and excessive, and praying that it might be abated, which appeal was, by the said Commissioner, afterwards, to wit, on the 11th day of August, 1886, refused and denied, and the defendant then and there, to wit, on the 26th day of August, 1886, at the said Chicago, demanded and exacted and collected the said sum of $57.83 from the plaintiff by duress against the protest of the plaintiff then and there made in writing;

And whereas, also, the plaintiff heretofore, to wit, on the 26th day of August, 1886, at Chicago, Cook county, Illinois, in the northern district of Illinois, paid to the defendant a certain sum of money, to wit, the sum of fifty-seven dollars and eighty-three cents, lawful money of the United States, upon compulsion and under protest, the same being demanded and exacted from the plaintiff in satisfaction of a certain so-called assessment of internal revenue tax under the revenue laws of the United States of America, which said sum of $57.83 and all of it, the plaintiff avers, was and is in excess
13 of any tax or sum of money then or at any time thereafter to this day due and payable by the plaintiff to the defendant,

and was by the defendant illegally demanded and exacted from the plaintiff, and the plaintiff thereafter duly and in proper form and apt time made appeal to the Commissioner of Internal Revenue, according to the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof, praying that the said sum of $57.83 might be refunded to the plaintiff, and a decision of the said Commissioner has been had thereon denying the said appeal and petition.

And the plaintiff avers that this is a suit for the recovery of an internal revenue tax erroneously and illegally assessed and collected, and that the same is brought within two years next after the cause of action accrued.

And for that whereas also the said defendant heretofore, to wit, on the 26th day of August, in the year of our Lord one thousand eight hundred and eighty-six, at Chicago, to wit, at the county aforesaid, became and was indebted to the said plaintiff in the sum of fifty-seven and $\frac{83}{100}$ dollars, of lawful money of the United States of America for divers, goods, wares, and merchandise by the said plaintiff before that time sold and delivered to the said defendant and at the special instance and request of the said defendant, and being so indebted to the said plaintiff the said defendant, in consideration thereof, afterwards, to wit, on the same day and year and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned when the said defendant should be thereunto afterwards requested.

14 And whereas also the said defendant afterwards, to wit, on the same day and year and at the place aforesaid, in consideration that the said plaintiff had before that time at the like special instance and request of the said defendant sold and delivered to the said defendant divers other goods, wares, and merchandise of the said plaintiff, the said defendant then and there undertook and faithfully promised the said plaintiff that the said defendant would well and truly pay to the said plaintiff so much money as the last aforesaid goods, wares, and merchandise at the time of the sale and delivery thereof were reasonably worth when the said defendant should be thereunto afterwards requested; and the said plaintiff avers that the said goods, wares, and merchandise last mentioned at the time of the sale and delivery thereof were reasonably worth the further sum of fifty seven and $\frac{83}{100}$ dollars, of like lawful money as aforesaid, to wit, at the place aforesaid, whereof the said defendant afterwards, on the same day and year at the place aforesaid, had notice.

And whereas also the said defendant afterwards, to wit, on the same day and year and at the place aforesaid, became and was indebted to the said plaintiff in the further sum of fifty-seven and $\frac{83}{100}$ dollars, of like lawful money as aforesaid, for money before that time lent and advanced by the said plaintiff to the said defendant and at the like request of the said defendant; and in the like sum for other money by the said plaintiff before that time paid, laid out, and expended for the said defendant and at the like request of the

said defendant; and in the like sum for other money by the said defendant before that time had and received to and for the use of the said plaintiff; and in the like sum for other money before
15 that time and then due and owing the said plaintiff for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from said defendant to said plaintiff.

And in the like sum for the price and value of work then done and material for the same provided by the said plaintiff for the said defendant and at the like special request of the said defendant.

And, being so indebted, the defendant, in consideration thereof, afterwards, to wit, on the same day and year, at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the several sums of money in this count mentioned when the said defendant should be thereunto afterwards requested.

And whereas also the said defendant afterwards, to wit, on the day and year last aforesaid and at the place last aforesaid, accounted together with the said plaintiff of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiff, and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear and indebted to the said plaintiff in the further sum of fifty-seven and $\frac{83}{100}$ dollars, of like lawful money as aforesaid; and, being so found in arrear and indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid and at the place last aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned when the said defendant should be thereunto afterwards requested.

16 Nevertheless the said defendant (although often requested, &c.) has not yet paid the said several sums of money above mentioned, or any or either of them or any part thereof, to the said plaintiff, but to pay the same or any part thereof to the said plaintiff the said defendant has hitherto altogether refused and still does refuse, to the damage of the said plaintiff of five hundred dollars, and therefore the said plaintiff brings suit, &c.

JOSEPH KIRKLAND,
Plaintiff's Attorney.

Copy of Account Sued On.

Renssellaer Stone to the Chicago Distilling Co., Dr.

To goods, wares, and merchandise sold and delivered, $500.
To money lent and advanced, $500.
To money paid, laid out, and expended, $500.
To money had and received to and for the use of said plaintiff, $500.
To money due for interest and forbearance, $500.
To labor, services, and material, $500.
To balance due on account stated, $500.

Plaintiff's Affidavit of Amount Due.

STATE OF ILLINOIS, }
County of Cook, } ss:

Circuit Court of Cook County. February Term, A. D. 1887.

CHICAGO DISTILLING CO. *vs.* RENSSELLAER STONE.

Joseph Kirkland, being duly sworn, says that the demand of the plaintiff in the above-entitled cause is for money illegally exacted from the plaintiff, and that there is due to the plaintiff from
17 the defendant, after allowing to him all just credits, deductions, and set-offs, fifty-seven dollars and eighty-three cents.

JOSEPH KIRKLAND.

Subscribed and sworn to before me this 11th day of February, 1887.

[SEAL.] GRANT NEWELL,
Notary Public.

And afterwards, to wit, on the 18th day of February, A. D. 1887, there was filed in said cause a certain writ of certiorari, which is in the words and figures following, to wit:

Writ of Certiorari.

The President of the United States of America to the judges of the circuit court of the county of Cook, in the State of Illinois, Greeting:

Whereas it has been shown to us, in our circuit court of the United States of America for the northern district of Illinois, by the petition under oath of Renssellaer Stone, accompanied by the proper certificate of a counsellor of the same court, that a certain suit of the Chicago Distilling Company, being an action of trespass on the case upon promises, against the said Renssellaer Stone, was lately commenced and is now pending in your court, and that the said suit is for and on account of an act done by the said Renssellaer Stone, under color of his office as collector of internal revenue of the said United States for the first district of Illinois, by which said petition the said Renssellaer Stone prays that the said suit may be removed from your said court into our said circuit court of the United
18 States, and that a writ of certiorari issue for that purpose, pursuant to section 643 of the Revised Statutes of the said United States: These are, therefore, to command you that, without excuse or delay, you forthwith cause to be certified to our said circuit court of the United States the record and proceedings in the suit aforesaid, without addition or diminution, to the end that the said suit be removed into our court aforesaid, and that speedy justice be done in the premises; and have you then and there this writ, with your return thereon.

To the marshal of the northern district of Illinois to execute.

Witness the Honorable Morrison R. Waite, Chief Justice of our Supreme Court of the United States of America, and the seal of our said circuit court, at Chicago, in the said northern district of Illinois, this fifteenth day of February, A. D. 1887, and of the Independence of the said United States the 111th year.

WM. H. BRADLEY, *Clerk.* [SEAL.]

19 UNITED STATES OF AMERICA, } ss:
State of Illinois, Cook County, }

I, Henry Best, clerk of the circuit court of Cook county, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect, and complete transcript of the record in a certain cause pending in said court on the common law side thereof between The Chicago Distilling Co., plaintiff, and Rensselaer Stone, collector, &c., defendant.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Chicago, in said county, this 8th day of June, A. D. 1887.

[SEAL.] HENRY BEST, *Clerk.*

STATE OF ILLINOIS, } ss:
County of Cook, }

I, M. F. Tuley, chief justice of the circuit court of Cook county, in the State of Illinois, hereby certify that Henry Best, who signed the above certificate, was at the time of signing the same and is now clerk of the said circuit court of Cook county, duly commissioned and qualified; that said court is a court of record, having a clerk and seal; that said attestation is in due form and by the proper officer according to the laws of the State of Illinois, and that the above signature of said clerk is genuine.

Witness my hand and seal, at Chicago, in said county of Cook, this 8th day of June, A. D. 1887.

M. F. TULEY, [SEAL.]
Chief Justice of the Circuit Court of Cook County.

Endorsed: Filed June 9, 1887. Wm. H. Bradley, clerk.

20 On the same day, to wit, on the ninth day of June, 1887, came the defendant, by his attorney, and filed in said clerk's office his plea in said entitled cause, which said plea is in the words and figures following, to wit:

Plea.

In the Circuit Court of the United States of America for the Northern District of Illinois. May Term, 1887.

RENSSELAER STONE
ats. } No. 20503.
THE CHICAGO DISTILLING COMPANY.

Assumpsit.

And the said Rensselaer Stone, defendant, by William G. Ewing

(United States attorney for this district), his attorney, comes and defends, etc., when, etc., and says that he did not undertake or promise in manner and form as the said plaintiff has above thereof complained against him, and of this the said defendant puts himself upon the country, etc.

WM. G. EWING,
U. S. Attorney, for Defendant.

Endorsed: Filed June 9, 1887. Wm. H. Bradley, clerk.

21 Afterwards, to wit, on the tenth day of June, 1887, there was filed in said clerk's office a stipulation in said entitled cause, which said stipulation is in the words and figures following, to wit:

Stipulation.

Circuit Court of the U. S., N. D. of Ills. June Term, 1887.

CHICAGO DISTILLING CO. *vs.* R. STONE.

Assumpsit.

It is hereby mutually stipulated and agreed that this case may be submitted to the court and tried without jury at any time hereafter at the convenience of the court.

Chicago, Ill., June 10, 1887.

JOSEPH KIRKLAND,
Attorney for Plaintiff.
W. G. EWING,
U. S. Att'y for Def't.,
Per HARRIS, *Ass't.*

Endorsed: Filed June 10, 1887. Wm. H. Bradley, clerk.

22 On the same day, to wit, on the tenth day of June, in the adjourned May term of said court, 1887, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

THE CHICAGO DISTILLING COMPANY
vs.
RENSSELAER STONE, Collector.

Assumpsit.

Now come the parties, by their respective attorneys, and upon issue joined herein by agreement of the parties, as per stipulation filed, they waive the intervention of a jury, and for trial put themselves upon the court, and, after hearing the evidence and the arguments of the counsel, the court takes the same under advisement.

23 Afterwards, to wit, on the twenty-fifth day of July, in the July term of said court, 1887, in the record of the proceed-

ings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Judgment.

THE CHICAGO DISTILLING COMPANY
vs.
RENSSELAER STONE, Collector of Internal Revenue for the First District of Illinois.

Assumpsit.

The court, having considered and being now fully advised upon the matters heretofore submitted herein, finds the issue for the defendant; and thereupon the plaintiff, by its attorney, moves the court for a new trial herein, and the court, being now fully advised upon said motion, overrules the same; to which overruling the plaintiff, by its attorney, then and there excepted. It is thereupon considered and adjudged by the court that said defendant do have and recover of said plaintiff his costs in this behalf expended and that he have execution therefor.

On motion of plaintiff's attorney it is ordered that the plaintiff have until September 1, 1887, to file its bill of exceptions.

24 On the hearing of said cause the following exceptions were taken and were allowed by the court and made of record, which said exceptions are in the words and figures following, to wit:

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of the United States for the Northern District of Illinois, of July Term, 1887.

THE CHICAGO DISTILLING CO.
vs.
R. STONE, Collector of Internal Revenue, 1st District of Illinois.

Assumpsit.

Be it remembered that on the trial of this cause in this term the plaintiff and the defendant therein mutually admitted, stipulated, and agreed that the following is a true statement of the material facts in this case and all of them, and the said statement was thereupon submitted to the court as the evidence therein.

25 *Stipulation.*

Circuit Court of the United States, Northern District of Illinois, to — Term, 1887.

CHICAGO DISTILLING CO. *vs.* R. STONE, Collector, &c.

Assumpsit.

For the purposes of this action the parties hereto mutually agree, admit, and stipulate as follows:

1. The Chicago Distilling Co., plaintiff herein, a corporation duly organized and existing under the laws of Illinois, paid to the defendant (then collector of internal revenue for the first district of Illinois), under protest, the sum of fifty-seven dollars and eighty-three cents on the 26th day of August, 1886.

2. The said Co. in September, 1885, operated a duly bonded and registered distillery known as distillery No. 5, first district of Illinois.

3. By Government survey the said distillery contained 15 fermenting tubs, numbered #1 to #15, inclusive, each having a total working capacity of 438.46 bushels of grain. It was using, under the said survey, a three-day fermenting period, and under the regulations of the Treasury Department the daily capacity of
26 each fermenting tub was one-third of the total working capacity—that is to say, 146.15 bushels of grain.

4. The following table is a true statement of the openings and closings of fermenting tubs and the mashings of grain and distillations of spirits during September, 1885, and also of the grain in mash brought forward from the preceding month and of the grain in mash carried forward to the succeeding month, and the notices for such openings and closings of fermenting tubs were duly filed in apt time and proper form, and the designated fermenting tubs were regularly, by the authorized agents of the Government, opened at the times specified, and the respective quantities of grain named in the said table as mashed and distilled were the quantities which were actually made and distilled; all as therein set forth under appropriate headings:

27 *Chicago Distilling Co.'s Distillery No. 5, 1st District of Illinois. Operations of September*, 1885. (*Sundays were 6th, 13th, 20th, and 27th.*)

Day of month.	MASHING. Fermenting tubs opened by collector & filled by distiller. (*Serial Nos.*)	Grain mashed. *Bushels.*
	Bro't forward from Aug: #8, #9, #10, #11, #12, & #13	2,631.00
1	#14, #15	877.
2	#1, #2	877.
3	#3, #4, #5	1,315.50
4	#6, #7	877.
5	#8, #9	877.
7	#10, #11, #12	1,315.50
8	#13, #14, #15	1,315.50
9	#1, #2, #3	1,315.50
10	#4, #5, #6	1,315.50
11	#7, #8, #9	1,315.50
12	#10, #11, #12	1,315.50
14	#13, #14, #15	1,315.50
15	#1, #2, #3	1,315.50
16	#4, #5, #6	1,315.50
17	#7, #8, #9	1,315.50
18	#10, #11, #12	1,315.50
19	#13, #14, #15	1,315.50
21	#1, #2	877.
22	#3, #4	877.
23	#5, #6, #7	1,315.50
24	#8, #9, #10	1,315.50
25	#11, #12, #13	1,315.50
26	#14, #15, #1	1,315.50
28	#2, #3	877.00
29	#4, #5	877.00
30	#6, #7, #8	1,315.50
		33,326.00
	Deduct mashing of 28th, 29th, and 30th Sept., carr. for'd to Oct	3,069.50
		30,256.50

Day of month.	DISTILLATION. Fermenting tubs emptied by distiller & closed by collector. (*Serial Nos.*)	Grain used, *i. e.*, distilled. *Bushels.*
1	#8, #9	877.00
2	#10, #11	877.00
3	#12, #13 (The above were filled in Aug.)	877.00
4	#14, #15	877.00
5	#1, #2	877.00
7	#3, #4, #5	1,315.50
8	#6, #7	877.00
9	#8, #9	877.00
10	#10, #11, #12	1,315.50
11	#13, #14, #15	1,315.50
12	#1, #2, #3	1,315.50
14	#4, #5, #6	1,315.50
15	#7, #8, #9	1,315.50
16	#10, #11, #12	1,315.50
17	#13, #14, #15	1,315.50
18	#1, #2, #3	1,315.50
19	#4, #5, #6	1,315.50
21	#7, #8, #9	1,315.50
22	#10, #11, #12	1,315.50
23	#13, #14, #15	1,315.50
24	#1, #2	877.00
25	#3, #4	877.00
26	#5, #6, #7	1,315.50
28	#8, #9, #10	1,315.50
29	#11, #12, #13	1,315.50
30	#14, #15, #1	1,315.50
		30,256.50

28 5. A certain assessment of tax in the sum of fifty-seven dollars and eighty-three cents was made in regular form and apt time against the Chicago Distilling Company by the Commissioner of Internal Revenue, acting on behalf of the U. S., and was duly certified to the defendant herein for collection from the plaintiff herein. The ground for said assessment was that during the month of Sep-

tember, 1885, as decided by said Commissioner, there was used at said distillery for the production of spirits by the distiller, this plaintiff, a certain quantity of grain, to wit, $294\frac{81}{100}$ bushels, in excess of the capacity of said distillery for said month as estimated according to law; said Commissioner deciding that said capacity for each and every working day during said month was as set forth in that part of the following tabular statement which is marked A, but this plaintiff claiming it to be as set forth in that part of said statement which is marked B.

29	A.		B.	
Sept. 1	876.93	bushels.	877.00	bushels.
" 2	876.93	"	877.00	"
" 3	876.93	"	877.00	"
" 4	1,023.08	"	877.00	"
" 5	1,023.08	"	877.00	"
" 7	1,023.08	"	1,315.50	"
" 8	1,023.08	"	877.00	"
" 9	1,023.08	"	877.00	"
" 10	1,023.08	"	1,315.50	"
" 11	1,315.39	"	1,315.50	"
" 12	1,315.39	"	1,315.50	"
" 14	1,315.39	"	1,315.50	"
" 15	1,315.39	"	1,315.50	"
" 16	1,315.39	"	1,315.50	"
" 17	1,315.39	"	1,315.50	"
" 18	1,315.39	"	1,315.50	"
" 19	1,315.39	"	1,315.50	"
" 21	1,315.39	"	1,315.50	"
" 22	1,169.24	"	1,315.50	"
" 23	1,169.24	"	1,315.50	"
" 24	1,169.24	"	877.00	"
" 25	1,169.24	"	877.00	"
" 26	1,169.24	"	1,315.50	"
" 28	1,169.24	"	1,315.50	"
" 29	1,169.24	"	1,315.50	"
" 30	1,169.24	"	1,315.50	"

30 6. The demand for and collection of the said sum of money from the plaintiff by the defendant was made by the defendant under and by virtue of the said assessment by the Commissioner of Internal Revenue.

7. The plaintiff, before the said tax was assessed, petitioned the Commissioner of Internal Revenue that the same be not assessed; after the assessment was made he petitioned that the assessment might be abated, and after payment as above set forth he petitioned

that the sum paid might be refunded; all which petitions were denied by the said Commissioner.

8. The document known as "Circular #238" was and is a regulation of the Treasury Department issued in due and customary form. The plaintiff knew of the existence of the said document and knew its contents; the document reads as follows:

CIRCULAR No. 238.

Regulations Concerning Changes in Capacity by Grain and Molasses Distillers.

1881.
Department No. 61.
Internal revenue.

TREASURY DEPARTMENT,
OFFICE OF THE COMMISSIONER
OF INTERNAL REVENUE.
WASHINGTON, D. C., *May* 27, 1881.

The existing regulations concerning changes made in the daily spirit-producing capacity of grain and molasses distilleries by the closing or opening of fermenting tubs are hereby modified as follows:

Hereafter when fermenting tubs are closed in a grain or molasses distillery, either on one day or on certain successive days in one fermenting period, pursuant to a notice from the distiller of his intention to reduce the producing capacity of his distillery and thereafter to manufacture daily a certain less quantity of spirits, the reduction in capacity resulting from closing the tub or tubs named in the distiller's notice will be deemed to occur, and will be allowed to the full extent of the total daily capacity of the tub or tubs closed at the end of the same number of hours after the closing of the first tub which is fixed by the survey as a fermenting period for the distillery—that is, 72 hours, 96 hours, or 144 hours, as the case may be.

In like manner when fermenting tubs are opened, either on one day or on certain successive days in one fermenting period, pursuant to notice by the distiller of his intention to increase the producing capacity of his distillery and thereafter to manufacture daily a certain larger quantity of spirits, the increase in capacity resulting from opening such tub or tubs will be deemed to occur, and will be allowed to the full extent of the total daily capacity of the tub or tubs opened at the end of the same number of hours after the opening of the first tub which is fixed by the survey as a fermenting period for the distillery—that is, 72 hours, 96 hours, or 144 hours, as the case may be.

Notices of change in capacity will hereafter be given on Form 126, revised in accordance herewith, and will state the day or successive days, not exceeding one fermenting period in number, upon which tubs are desired to be closed or to be opened, as the case may be, the serial numbers of the tubs to be closed or to be opened each day, the working capacity of each tub in gallons, and its daily capacity in bushels, the daily spirit-producing capacity of the distillery after the change shall be completed, and such other information as is called for by the form.

When a change is to be made by closing tubs, or by opening them, as the case may be, on successive days, the notice should be given upon one form—126; or, if several notices are given, they should be given at the same time, and bear the same date, and should each state the total change intended.

When notices of changes to be made on successive days are given at different dates, or when tubs are opened or closed on days not immediately successive, only the change in capacity resulting from each opening or closing, as the case may be, will be allowed at the end of a period equal to the fermenting period fixed by the survey of the distillery after such opening or closing.

When tubs are opened and other tubs are closed on the same day their difference, if any, in daily capacity only will be allowed.

30½ It will be observed that the present practice of holding tubs not intended to be used open during the whole or a part of a fermenting period in order to retain the requisite capacity until the larger quantity of material previously mashed has been distilled, is no longer necessary, because the closing of the tub does not affect the capacity of the distillery at the time of closing; but that, on the contrary, the tub should be closed (if reduction is desired) as soon as emptied (unless emptied before the end of the fermenting period fixed by law, in which case it should be closed at the end of such period), in order that its capacity may be withdrawn from the total capacity of the distillery not later than at the end of one fermenting period, when, because of its being closed, the product of the distillery will be reduced.

So, also, the opening of tubs for the purpose of increasing capacity will not affect the capacity of the distillery until one fermenting period has elapsed from the opening of the tub, or from the opening of the first of a series opened on each of successive days, and until (if the tubs were filled) the spirit product of the distillery is affected thereby.

When the distiller is not using the full fermenting period allowed by law a change in capacity will take effect either at the end of the legal fermenting period or on any previous day upon which the spirit product of the distillery is affected by the change.

The certificates of the collector and deputy collector upon Form 126 will show that the tubs have been closed or opened in the manner required by law and regulations; the serial numbers of the tubs open, and the serial numbers of the tubs closed, after the change, and the daily capacity of the distillery resulting from the change, and the date when the same takes effect.

These notices are to be given in duplicate, and deputy collectors are hereby required to deliver or to forward them to the collector on the day that the fermenting tubs are closed or opened, in accordance with the notice; and collectors are required on the day of their receipt to examine the same, append their certificates, and forward one copy to this office. The retention of these notices by deputies, or their accumulation in the office of the collector, must not be permitted.

Collectors will at once make requisition for a sufficient number of copies of this circular to furnish every grain or molasses distiller, and each storekeeper, or storekeeper and gauger, and deputy collector in their respective districts with a copy of the same, and will direct the officers to call the attention of the distillers to the provisions of the circular, and to instruct them as to the proper methods of making changes in capacity therein prescribed.

They will also make requisition for a full supply of Form 126, revised, and will require all notices of changes in capacity to be given on the revised form.

GREEN B. RAUM,
Commissioner.

Approved:
WILLIAM WINDOM,
Secretary of the Treasury.

Stipulation agreed to.

JOSEPH KIRKLAND,
Attorney for Plaintiff.

31 It being admitted on both sides that the assessment sought herein to be recovered was levied pursuant to the authority and in pursuance of the rules of computation laid down in Treasury Department Circular No. 238 of May 27th, 1881, set forth in the foregoing stipulation, and that if the said circular is for any reason void then the plaintiff may recover.

The plaintiff thereupon asked the court to rule, as a matter of law, that the said so-called assessment was unjust, unlawful, and excessive in amount and was not a valid claim on the part of the defendant against and upon the plaintiff, and that the payment thereof by the plaintiff to the defendant, being under duress, the sum paid in satisfaction of the said claim should be refunded, and the plaintiff asked judgment against the defendant for the said sum, but the court refused to rule and hold as law as requested by the plaintiff; but, on the contrary, ruled that the said assessment was lawful; to which action and conclusions and holdings of law the plaintiff then and there excepted, and tenders this its first bill of exceptions, which it prays may be signed, sealed, and enrolled and made a part of the record herein, and the same is done accordingly.

[SEAL.] H. W. BLODGETT.

32 And the plaintiff, hereby referring to its first bill of exceptions and making the same a part of this its second bill of exceptions, also, on the trial of the said cause, tendered the court a certain proposition in writing to be held as law in this cause by the court, the said cause being tried by the court without a jury, in words and figures following, to wit:

Instructions Asked by Plaintiff.

CHICAGO DISTILLING CO. *vs.* STONE.

It being admitted that the fifteen fermenting tubs in use in plain-

tiff's distillery in September, 1885 (the month covering the operations on which this assessment is based), had each a total capacity of $438\frac{46}{100}$ bushels of grain, and that the openings and closings of those tubs in that month were duly and regularly made;

And it being further admitted that up to and including Sept. 28th there had been no use of grain in excess of surveyed capacity, excepting fractions, amounting in all to $2\frac{28}{100}$ bushels;

And it being further admitted that on Sept. 25 and 26th there were six tubs regularly open, and that the total surveyed capacity of those six tubs was $2{,}630\frac{76}{100}$ bushels.

And it being admitted that there were 2,631 bushels of grain mashed into those tubs on Sept. 25th and 26th;

33 And it being admitted that the fermenting period then and there lawfully used (three days) expired for those six tubs on Sept. 29th and 30th (Sept. 27th having been Sunday), the court holds as a matter of law that the total mashings of the 25th and 26th of September were properly distilled on the 29th and 30th to the extent of $2{,}630\frac{76}{100}$ bushels, and that the estimate admitted to have been made by the Commissioner of Internal Revenue of the grain capacity of the said distillery for the two days last named, viz., $2{,}338\frac{48}{100}$ bushels, was erroneous and unlawful, being $298\frac{28}{100}$ bushels below the lawful grain capacity, and that the total lawful capacity of the said distillery to use grain during the said month was $30{,}253\frac{98}{100}$ bushels and the actual use of grain in excess of surveyed capacity was $2\frac{52}{100}$ bushels, instead of $294\frac{81}{100}$ bushels, admitted to have been assessed as the quantity overused, leaving $292\frac{29}{100}$ bushels as the quantity erroneously assessed; and the court holds that the corresponding sum of $57.35 was unlawfully assessed against the plaintiff and demanded and collected from the plaintiff by the defendant.

Which the court refused to hold to be law applicable to this case; to which action of the court the plaintiff, by its counsel, then and there excepted and tendered this its second bill of exceptions, which it prays may be sealed, signed, and enrolled, and the same is done accordingly.

[SEAL.] H. W. BLODGETT.

Endorsed: Filed Sep. 1st, 1887. Wm. H. Bradley, clerk.

34 Afterwards, to wit, on the twenty-second day of August, 1887, there was filed in said clerk's office a bond in said entitled cause, which said bond is in the words and figures following, to wit:

Bond.

Know all men by these presents that we, The Chicago Distilling Company and Joseph Kirkland, are held and firmly bound unto Rensselaer Stone in the full and just sum of five hundred dollars, to be paid to the said Rensselaer Stone, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 22d day of August, in the year of our Lord one thousand eight hundred and eighty-seven.

Whereas lately, at a term of the United States circuit court for the northern district of Illinois, in a suit depending in said court between the Chicago Distilling Company, complainant, and Rensselaer Stone, defendant, judgment was rendered against the said The Chicago Distilling Company, and the said The Chicago Distilling Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Rensselaer
35 Stone citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said The Chicago Distilling Company shall prosecute its — to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

[Corporation Seal.]

THE CHICAGO DISTILLING CO.,
By THOS. HUTCHINSON, *Sec'y.* [SEAL.]
JOSEPH KIRKLAND. [SEAL.]

Approved by—
W. Q. GRESHAM,
Circuit Judge

Endorsed: Filed Aug. 22, 1887. Wm. H. Bradley, clerk.

36 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the record of all the proceedings had in said court in the cause wherein The Chicago Distilling Company is the plaintiff and Rensselaer Stone, collector of internal revenue for the first district of Illinois, is the defendant, as the same appear from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this thirteenth day of September, 1887.

[Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.]

WM. H. BRADLEY, *Clerk.*

37 UNITED STATES OF AMERICA, }
Northern District of Illinois, } *ss:*

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, Greeting:

Because in the record and proceedings as also in the rendition of a judgment in a plea which is before you in said circuit court, between

The Chicago Distilling Company, plaintiff, and Rensselaer Stone, defendant, in an action of assumpsit, a manifest error hath happened, to the great damage of the said The Chicago Distilling Company, plaintiff, as by its complaint appears, and it being fit that the error, if any there has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1887, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 22nd day of August, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the 112th year.

[Seal of Circuit Court U. S., Northern Dist. of Illinois, 1855.]

WM. H. BRADLEY,
Clerk of the Circuit Court of the United States
for the Northern District of Illinois.

[Endorsed:] Supreme Court of the United States. The Chicago Distilling Company, plaintiff in error, *vs.* Rensselaer Stone. Writ of error.

38 UNITED STATES OF AMERICA, }
Northern District of Illinois, } *ss:*

To Rensselaer Stone, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, A. D. 1887, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein the Chicago Distilling Company is plaintiff and Rensselaer Stone is defendant, to show cause, if any there be, why the judgment mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Walter Q. Gresham, judge of the seventh judicial circuit, this 22d day of August, in the year of our Lord one thousand eight hundred and eighty-seven.

W. Q. GRESHAM,
Circuit Judge.

Service accepted this 22d day of August, 1887.

WM. G. EWING,
U. S. Attorney for Def't.

39 [Endorsed:] Supreme Court of the United States. The Chicago Distiling Company *vs.* Rensselaer Stone. Citation to October term, A. D. 1887.

40 *Assignment of Errors.*

The court, sitting without a jury, erred in holding that the assessment in question was lawful, as set forth in the first bill of exceptions.

The court erred in refusing to hold as a matter of law applicable to the facts in the case the proposition in writing set forth in the second bill of exceptions.

The court erred in giving judgment for the defendant.

Endorsed on cover: N. Illinois C. C. U. S. No. 1090. The Chicago Distilling Company, plaintiff in error, *vs.* Rensselaer Stone, collector of internal revenue. Filed October 3, 1887.

IN THE

UNITED STATES SUPREME COURT.

OCTOBER TERM, A. D. 1887.

THE CHICAGO DISTILLING CO.,
Plaintiff in Error,
vs.
R. STONE (Collector, etc.),
Defendant in Error.

Error to the
CIRCUIT COURT of the U. S.
for the
NORTHERN DISTRICT
OF ILLINOIS.

Brief and Argument

FOR THE PLAINTIFF IN ERROR.

JOSEPH KIRKLAND, Attorney for Plaintiff in Error.

CHICAGO:
FERGUS PRINTING COMPANY.
1887.

IN THE

UNITED STATES SUPREME COURT,

OCTOBER TERM, A. D. 1887.

THE CHICAGO DISTILLING CO.,
Plaintiff in Error,
vs.
R. STONE (Collector, etc.),
Defendant in Error.

Error to the CIRCUIT COURT of the U. S. for the NORTHERN DISTRICT OF ILLINOIS.

REFERENCES.

THE WRITTEN FIGURES HEREIN REFER TO **MARGINAL PAGES** OF THE **PRINTED RECORD.**

Brief and Argument

FOR THE PLAINTIFF IN ERROR.

THIS is a test case, prosecuted by certain distillers seeking relief from exactions which they charge to be unlawful. The plaintiff by its counsel and the U.S. (in defense of its officer) by its attorney, stipulated and agreed regarding all material facts, to the end that the questions at issue might be readily adjudicated; and their stipulation is made part of the record before the court.

Stipulation § 5. Record, p. 28

Plaintiff sues to recover a sum paid by it to defendant in satisfaction of an assessment based on alleged use of grain in excess of the lawful capacity of plaintiff's distillery during September, 1885.

Basis of defendant's allegation of excessive use of grain and of plaintiff's claim for the refunding of the sum assessed and paid on that account.

What is "lawful capacity" of a distillery under Internal Revenue law?

It is of two kinds:

1. "Grain capacity;" license to use grain.
2. "Spirit capacity;" obligation to produce spirit.

How is "lawful capacity" fixed?

§ 3264 R.S. It is established by a "survey," made by the U.S. and taking effect at noon of the third day after the distiller's bond is approved. Forever after that (until a new survey shall be granted) this remains the unchangeable rule by which the distiller's rights (license to use grain), his obligations (duty to produce spirits), and all other material conditions of his business (fermenting-period, proportion of grain and water in the "mash," proportion of spirit to grain, etc., etc.) are irrevocably fixed. "Where ... a survey of a distillery and an estimate of its producing capacity are made, and a copy thereof furnished the distiller, such survey and estimate ..... can only be abrogated by a new survey and estimate .... a copy of which is furnished to the distiller."

U. S. *vs.* Ferrary. 93 U.S. 624.

What physical thing measures a distiller's "grain capacity" (license to use grain)?

Stipulation § 3. The sum of the contents, when filled, of all the fermenting-tubs the distillery contains is the "total capacity," and that, divided by the number of days in the fermenting-period, is the "daily capacity."

How can the original measure of a distiller's rights and obligations under his survey be reduced?

§ 3311 R.S. Only by his making application to the U. S. officials, stating his desire to have a certain fermenting-tub, or certain

tubs, closed and sealed; and their being so closed and sealed by such officials. (Such tubs may afterward be restored to use by being unsealed and opened, according to regulations).

ASSIGNMENT OF ERRORS.

The court, sitting without a jury, erred in holding that the assessment in question was lawful, as set forth in the plaintiff's first bill of exceptions.

Record, p. 31

The court erred in refusing to hold as a matter of law applicable to the facts in the case the proposition in writing set forth in the second bill of exceptions.

Record, p. 32

The court erred in giving judgment for the defendant.

Record, p. 23

We may disregard all consideration of any possible dereliction in filling "spirit capacity," as it is admitted that this assessment was made for *over-use of grain* amounting to $294^{81}/_{100}$ bushels.

Stipulation § 5. p. 28

We may also disregard the distillations of every day in the month down to and including Sept. 28th, because it is admitted that down to that time the Government estimate of grain capacity (license to use grain) was $27.623^{22}/_{100}$ bushels, while the quantity actually used was but $27.625^{50}/_{100}$ bushels, the difference ($2^{28}/_{100}$ bushels) being the sum of several unconsidered and inconsiderable fractions.

Stipulation Table following § 5. p. 29

Subjoined is a copy of the table following § 5 of the stipulations filed in this case, the portion in red being elucidations merely, added by the writer hereof:

Stipulation § 3. p. 25 26

On comparing the mashings and distillations with the admitted capacity of tubs it will be seen that no tub was ever filled beyond its capacity, i.e., $438^{46}/_{100}$ bushels (barring an inappreciable fraction); nor was any tub ever filled at any unauthorized time.

COPY OF TABLE FOLLOWING § 5 OF "STIPULATIONS."

	A {Goverment estimate of grain capacity.}			B {Grain accually used by distillation.}		
Sept. 1,	876.93 bu.			Sept. 1,	877.00 bu.	2 tub
" 2,	876.93 "	2630.79	2631.00	" 2,	877.00 "	2 "
" 3,	876.93 "			" 3,	877.00 "	2 "
" 4,	1023.08 "			" 4,	877.00 "	2 "
" 5,	1023.08 "	3069.24	3069.50	" 5,	877.00 "	2 "
" 7,	1023.08 "			" 7,	1315.50 "	3 "
" 8,	1023.08 "			" 8,	877.00 "	2 "
" 9,	1023.08 "	3069.24	3069.50	" 9,	877.00 "	2 "
" 10,	1023.08 "			" 10,	1315.50 "	3 "
" 11,	1315.39 "			" 11,	1315.50 "	3 "
" 12,	1315.39 "	3946.17	3946.50	" 12,	1315.50 "	3 "
" 14,	1315.39 "			" 14,	1315.50 "	3 "
" 15,	1315.39 "			" 15,	1315.50 "	3 "
" 16,	1315.39 "	3946.17	3946.50	" 16,	1315.50 "	3 "
" 17,	1315.39 "			" 17,	1315.50 "	3 "
" 18,	1315.39 "			" 18,	1315.50 "	3 "
" 19,	1315.39 "	3946.17	3946.50	" 19,	1315.50 "	3 "
" 21,	1315.39 "			" 21,	1315.50 "	3 "
" 22,	1169.24 "			" 22,	1315.50 "	3 "
" 23,	1169.24 "	3507.72	3508.00	" 23,	1315.50 "	3 "
" 24,	1169.24 "			" 24,	877.00 "	2 "
" 25,	1169.24 "			" 25,	877.00 "	2 "
" 26,	1169.24 "	3507.72	3508.00	" 26,	1315.50 "	3 "
" 28,	1169.24 "			" 28,	1315.50 "	3 "
	27023.22				27025.50	
" 29,	1169.24 "			" 29,	1315.50 "	3 "
" 30,	1169.24 "	2338.48	2031.00	" 30,	1315.50 "	3 "

TEN FIGURES HEREIN,
REFER TO
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OF THE
NTED RECORD.

Thus is the question narrowed down to this: were the distillations of Sept. 29th and 30th within the lawful "grain capacity" of the distillery?

Stipulation § 4. p. 26

The six tubs distilled on those days were Nos. 11, 12, and 13, filled on Sept. 25th, and Nos. 14, 15, and 1, filled on Sept. 26th. It is admitted that they were regularly opened by Government officers on the days when they were respectively filled. It is admitted that each of those tubs had a total capacity of $438^{46}/_{100}$ bushels of grain, which for the six, results in a total capacity of $2630^{76}/_{100}$ bushels. It is admitted that the fermenting-period was three days, and it results that their appropriate days for distillation were Sept. 29th and 30th (Sept. 27th having been Sunday), i.e., three tubs, $1315^{39}/_{100}$ bushels, on each day, making $2630^{76}/_{100}$ in all.

Stipulation § 3. Ibid. p 25

Stipulation Column A in table following § 5. p. 29

Stipulation § 5. p. 28

It is admitted that *the Government estimate* of the "grain capacity" (license to use grain) of that distillery on Sept. 29th and 30th was $1169^{24}/_{100}$ bushels per day, or $2338^{48}/_{100}$ bushels for the two days; and that the difference between $2630^{76}/_{100}$ bushels and $2338^{48}/_{100}$ bushels, *viz.*: $292^{28}/_{100}$ bushels is the main basis of this assessment, the remaining $2^{53}/_{100}$ being the sum of many inconsiderable fractions, not necessary to recognize in this case.

This is the issue: the plaintiff avers that *without exceeding its lawful capacity* it could, on Sept. 29th and 30th, distill $2630^{76}/_{100}$ bushels of grain from the six tubs filled Sept. 25th and 26th, while the defendant avers that the plaintiff could only distill $2338^{48}/_{100}$ bushels. The defendant charges that there was *too much used* in the running; the plaintiff charges that there was *too little allowed* in the accounting.

We have seen how the distiller arrives at his estimate of grain-distilling capacity on Sept. 29th and 30th. He derives it from his lawful mashing capacity on Sept. 25th and 26th, and the lapse of a lawful fermenting-period. Now, how does

the defendant reach *his* estimate of grain-distilling capacity, $1169\frac{24}{100}$ bushels per day, that not being a multiple of the capacity of any tub?

Stipulations final §. p. 30

Circular No. 238 points out the method. It says that the three days (Sept. 25th, 26th, and 28th) of the fermenting period, which includes the mashing time of those six tubs and two other tubs, must be lumped together and the mashings, taken in mass, divided by three to fix the "daily capacity;" and that the license to use (distill) grain must begin to the extent of the "daily capacity," so fixed at the end of such fermenting period (three days) and continue evenly through the next three days.

The filling of tubs Sept. 25th, 26th, and 28th, and distilling of their contents, and the application of circular No. 238 thereto, are all shown in the subjoined table:

Date.	Tubs filled.	Grain, bu.	Distilled, bu.		Should have been distilled according to Circular 238.	
Sept. 25,	No. 11.	438.46	Sept. 29,	438.46		
" 25,	" 12.	438.46	" 29,	438.46	1315.38	Sept. 29, 1169.24
" 25,	" 13.	438.46	" 29,	438.46		
" 26,	" 14.	438.46	" 30,	438.46		
" 26,	" 15.	438.46	" 30,	438.46	1315.38	Sept. 30, 1169.24
" 26,	" 1.	438.46	" 30,	438.46		
" 28,	" 2.	438.46	Oct. 1,	438.46		
" 28,	" 3.	438.46	" 1,	438.46	876.92	Oct. 1, 1169.24

The summation of the three days' distillations is $3707\frac{68}{100}$ which, divided by three, gives the Government estimate of "daily grain capacity" $1169\frac{24}{100}$.

The discrepancy arises from the fact that the distillations of Sept. 29th and 30th were necessarily $1315\frac{38}{100}$ bushels each day, while those of Oct. 1st were only $876\frac{92}{100}$ bushels.

Thus comes it to pass that the Government credits the distiller *too little* "grain capacity" (license to use grain) in

REFERENCES.
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September by $292\,^{28}/_{100}$ bushels, and *too much* in October by the same quanty.

It seems self-evident that this produces a *constructive excess* in September.

Stipulation Table following § 5, Column A.

As before observed, the stipulations admit that the Government estimate of plaintiff's grain capacity on the 29th and 30th of September is $1169\,^{24}/_{100}$ bushels. The plaintiff denies that this is or could be the true grain-using capacity on those days or on any day, because it is not a multiple of the capacity of any tub. The contents of each tub ripen in seventy-two hours after mashing and are necessarily distilled forthwith. Therefore (where each tub has a total capacity of $438\,^{46}/_{100}$ bushels) the grain-using capacity on any given day must be either the contents of one tub, $438\,^{46}/_{100}$ bushels; or of two tubs, $876\,^{93}/_{100}$ bushels; or of three tubs, $1315\,^{39}/_{100}$ bushels (as plaintiff alleges for Sept. 29th and Sept. 30th); or of some other multiple of the contents of one tub. Never in any supposable case $1169\,^{24}/_{100}$ bushels, as set up by the Government. That is a pure fiction, an imaginary mass of grain conceived in the brain of an accountant, and not corresponding with any mass of grain existing in the solid and ponderous operations of the distillery. When $1315\,^{39}/_{100}$ bushels of grain had been mashed on Sept. 25th, it was not practicable to distill only $1169\,^{24}/_{100}$ bushels on Sept. 29th; and and the same is true of the mashings of Sept. 26th and distillations of Sept. 30th.

§ 3264 R.S. as amended by act of 1879. § 5.

Where is warrant of law for this arbitrary fiction? The statute provides that the "true spirit-producing capacity for a day of twenty-four hours" shall be estimated and determined. Each day (Sept. 29th and Sept. 30th) was a day of twenty-four hours, and the spirit-producing (and grain-using) capacity for that day should have been estimated and determined. If this had been done in the case at bar, it would

have been found to be $1315^{39}/_{100}$ bushels. But the accounting-officer elected to lump together the grain-using capacities of Sept 29th, Sept. 30th, and Oct. 1st; then to divide the product by three and apply the quotient, $1169^{24}/_{100}$ bushels, as the capacity for each day. This seems manifestly unlawful. Instead of the "true capacity," he found an arbitrary and fictitious average, and assessed the distiller for exceeding it on the two earlier days of the three. To attempt to plaster the varying and unequal mashings of Sept. 25th, 26th, and 28th over Sept. 29th, Sept. 30th, and Oct. 1st, and, by threat of assessment, compel a uniform distillation on each of the three days last named, seems a contravention of law as well as an absurdity in physics.

The survey says that he shall distill his mash at the end of seventy-two hours; and the notorious physical fact is that after the expiration of the fixed time fermentation passes from the spirituous to the acetous stage and deterioration at once begins. Any residuum of mash fully ripe on Sept. 29th would by Oct. 1st be fit for little else than material for vinegar. Circular No. 238 aims to enforce a constructive average. It presents a procrustean bed for bodies of fixed lengths—living bodies; grain seething in the process of fermentation.

Perhaps the clearest method for testing the validity of circular No. 238 may be to suppose a case, the very simplest that can arise, whereby a distiller (acting in apparent conformity with law) may, under its provisions, make himself liable to assessment for over-use of material.

SUPPOSITITIOUS CASE.

In a distillery having but one fermenting-tub, the surveyed total grain capacity whereof is 300 bushels and the fermenting period three days, the distiller elects to open his tub and

REFERENCES.
WRITTEN FIGURES HEREIN,
REFER TO
ORIGINAL PAGES
OF THE
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fill it with the prescribed quantity of grain on Sept. 27th, to ferment its contents the prescribed time, and to distill them on Sept. 30th. *Can he be lawfully assessed for over-use of material?*

Every step he has taken was prescribed or authorized by his survey. The opening of his tub on Sept. 27th was authorized; the mashing into it of 300 bushels of grain was authorized; the fermenting his mash three days was prescribed; the distillation of the mash on Sept. 30th was prescribed. Where was his misstep?

Under circular No. 238 he is assessable for over-use in September of 200 bushels of grain.

Here is his exact "grain capacity" as laid down in his survey. On Sept. 27th a mashing capacity of 300 bushels, but no distilling capacity. During the next seventy-two hours a fermenting capacity of 300 bushels but no mashing or distilling capacity; and on Sept. 30th a distilling capacity of 300 bushels. *No distilling capacity whatever on Oct. 1st or 2d.* Yet the Bureau regulation, ignoring the fact that though it takes three days to ferment, it only takes three hours to distill a tub of mash, prescribes that the distillation shall proceed evenly during three days, and that if he distills more than 100 bushels in September he will be assessed for over-use of grain in that month.

Stipulations final §. p. 30

The circular says: "The increase in capacity resulting from opening such tub or tubs will be deemed to occur, and will be allowed to the full extent of the total daily capacity of the tub or tubs opened at the end of the same number of hours after the opening of the first tub which is fixed by the survey as a fermenting-period for the distillery."

The "total daily capacity" in a three-day period is one-third of the "total capacity" of a tub. Therefore, in the above supposed case, on Sept. 30th, when the distiller is

compelled by physical laws and by statute law to distill the total contents of his one tub, the circular gives him the right to distill only its "daily capacity"—one-third of the total contents, "a constructive and not an actual use of material in excess of capacity."

Veitzel *vs.* Rabe, 103 U. S., 343.

The Department will readily admit the absolute accuracy of the above statement of the operation of circular No. 238 in such a case as that set forth; and (if we may anticipate its rejoinder) it will say: "He should not have opened and filled his tub on Sept. 27th. He should have studied circular No. 238 and in that way learned that to do so would make him liable to assessment."

We join issue. We maintain that the distiller has a right to be guided by his survey and to mash grain at such times as his trade may demand, limited only by his survey; and that the right to mash includes the right to immunity from assessment for distilling the mash at the prescribed time; and that any attempt to forbid such mashing on any lawful day, or to place limits on distillation other than those made by the statute prescribing the survey, is inconsistent with law, and void. The tax-payer should not be told to warp his lawful acts to suit an arbitrary, unlawful, and unreasonable system of book-keeping. The accounts should be made to correspond with the lawful acts.

The case at bar is on all fours with the supposititious case above presented. It is only complicated and encumbered by the circumstance that the plaintiff was running other tubs at the same time. This does not change the fact that it was the filling of six tubs on Sept. 25th and 26th, and the distillation of their contents on the 29th and 30th which formed the basis of the assessment in question. They, in their filling and distilling, are accurately represented by the single tub in the supposititious case.

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True, the distiller could have avoided assessment by closing a tub on Sept. 25th or 26th and leaving it closed until danger of assessment was past. But we find nothing in any law requiring the distiller to close a tub—to reduce the capacity of his distillery—at any time. When he desires to do so, the law points out the way. Until he desires to do so, he is free to work on up to his entire surveyed capacity. If he and his bondsmen will be responsible for the production of spirit to ~~the full extent~~ of his surveyed capacity and the payment of tax thereon, it is his right to mash the fill of every tub as often as its fermenting-period recurs. When he prefers to lessen his responsibility he may do so; but when the Department requires him, under threat of assessment, to lessen the mashing of grain and the production of spirit, it exceeds its lawful powers, and is properly chargeable with "placing a limitation not contemplated by Congress."

§ 3311 R.S.

80%

Morrill *vs.* Jones, 106 U. S., 466.

Vain to say that this is the only way in which distillers' accounts can be kept. The distiller himself must keep and render a *daily* account—not a *three-daily* one—and he does so, and at the end of each month it balances to a dot. *So many* tubs open; *so many* bushels the total grain capacity of each; *so many* times did the fermenting-period of each recur. He multiplies these three factors together. To the product he adds grain in mash brought forward from preceding month and from it deducts grain in mash carried over to following month, and the result is his "grain capacity"—license to use grain—as he and the U. S. storekeeper in charge of his distillery understand it.

§ 3303 R.S.

He foots up his account of the bushels of grain used, and the U. S. storekeeper foots up *his* account of the same, and both correspond with the "grain capacity" both have figured up as above. Every tub stands on its own bottom. There is no "trick of figures" in *their* work, and the tax-payer and

§ 3301 2 R. S.

the local Government official are alike surprised when (as has happened in hundreds of cases) on their sending forward, in full faith and confidence, their monthly statements of grain used, they receive from Washington, in return, notice of an assessment for over-use.

It is confidently believed that the law and the facts already brought to the attention of the court should, by their own force, give the plaintiff the relief sought. But if precedent be asked, it is to be found in Weitzel *v.* Rabe, decided by this court in 1880. The case is substantially parallel with this. In that case, the distiller, *reducing* his capacity, complained that the Bureau had, in its accounts, reduced *too soon* his license to use grain, and the court sustained his claim. In this case, the distiller, *increasing* his capacity, complains that the Bureau has increased *too late* his license to use grain, and asks the court to sustain his claim.

Weitzel *vs.* Rabe, 103 U. S., 340.

In that case, the distiller having mashed on April 30th certain grain, claimed the right to distill it at the end of its fermenting-period, on May 2d, when the spirits could be "properly developed and separated from the material." And the court sustained the claim.

Ibid. (Opinion of the Court.)

In our case, on Sept. 29th and 30th, and not later, the spirits "could be properly developed and separated from the material" mashed Sept. 25th and 26th, and we claim the right to distill that material, and all of it, at the end of its fermenting-period, on Sept. 29th and 30th, accordingly. Can the court do otherwise than sustain the claim?

In that case, the court brushed aside the fiction that $415^{96}/_{100}$ bushels of grain in mash not ripe for distillation till May 2d could be *supposed* to have been distillable April 30th. In our case, we ask similar action regarding the fiction that $292^{28}/_{100}$ bushels of grain in mash ripe for distillation on Sept. 29th and 30th should be *supposed* not to have been distilled till Oct. 1st.

Weitzel *vs.* Rabe, 103 U. S., 342.

In that case, the court below charged the jury that the capacity of the distillery was not in law reduced until the 4th day of May; that it continued for the 2d and 3d days of May to be $415^{96}/_{100}$ bushels, and this being the quantity of grain in fact used, there was no use of grain in excess of the capacity of the distillery, and the assessment was therefore illegal; and this court sustained the position.

Record. Instruction asked. p. 33

In our case, we asked the court, sitting without a jury, to hold that the capacity of the distillery was in law increased on Sept. 29th to $1315^{38}/_{100}$ bushels and so continued on Sept. 30th, and this being the quantity of grain in fact used, there was no use of grain in excess of the capacity of the distillery, and the assessment was therefore illegal; which the court refused to hold, noting our exception to such refusal.

Weitzel *vs.* Rabe, 103 U. S., 343.

Chief Justice Waite in his opinion says: "The distiller reported his actual product and paid the taxes thereon in full. The amount now sued for was evidently paid on account of a constructive and not an actual use of material in excess of capacity. There is no pretense of bad faith. The distiller did what was required of him to get a reduction of capacity while his distillery was in operation. Under such circumstances he was entitled to have the capacity estimated while the reduction was going on in such a way as not to charge him with material in mash when the change was applied for as material used in excess of capacity."

Change the words "a reduction" to "an increase" in the two places where they occur, and the above opinion seems to fit accurately the case at bar. Material must be not constructively used, but actually used in excess of surveyed capacity to form the basis of a valid assessment. Nothing could be more flatly "constructive" and fictitious than the idea that grain lawfully mashed Sept. 25th and 26th could not be lawfully distilled on Sept. 29th and 30th.

It seems to the plaintiffs that their case is of the utmost